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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF MARYLAND,

Petitioner,

v.

LENARD BERNARD OWENS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
MARY ELLEN BARBERA
SARAH E. PAGE
Assistant Attorneys General

200 Saint Paul Place
Baltimore, Maryland 21202
(301) 576-6422

Counsel for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Where an unlocked bag is left by its owner at a third party's apartment and the third party gives the police consent to search the bag, is it lawful under the Fourth Amendment for the officers to conduct the search?

2. Where the police have probable cause to believe that illegal drugs are contained in an unlocked bag, is it reasonable under the Fourth Amendment for the officers to search the bag without first obtaining a warrant?

PARTIES

The caption contains the names of all the parties below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

PARTIES.....ii

OPINIONS BELOW.....2

STATEMENT OF JURISDICTION.....2

CONSTITUTIONAL PROVISION INVOLVED.....3

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....12

I. The Maryland Court of Appeals has wrongly decided a novel issue of great public importance.....12

II. The lower courts are in conflict on the issue of whether a bailee can consent to the search of bailed property.....14

III. This case presents an opportunity to extend the Acevedo bright line rule.....19

CONCLUSION.....21

APPENDIX.....1a

TABLE OF AUTHORITIES

Page

Cases

Arkansas v. Sanders,
442 U.S. 753 (1979).....11, 19, 20

California v. Acevedo,
111 S. Ct. 1982 (1991).....14, 20, 21

Commonwealth v. Latshaw,
481 Pa. 298, 392 A.2d 1301
(1978), cert. denied,
441 U.S. 931 (1979).....18

Commonwealth v. Silo,
480 Pa. 15, 389 A.2d 62
(1978), cert. denied,
439 U.S. 1132 (1979).....17

Cooper v. State, 492 So. 2d 1059
(Fla. 1986) (per curiam), cert.
denied, 479 U.S. 1101 (1987).....18

Owens v. State, 322 Md. 616,
589 A.2d 59 (1991).....2

Owens v. State, 83 Md. App. 353,
574 A.2d 362 (1990).....2

Sartain v. United States,
303 F.2d 859 (9th Cir.),
cert. denied, 371 U.S. 894 (1962)....17

State v. Buschkopf, 373 N.W.2d 756
(Minn. 1985).....15

State v. Chenette, 151 Vt. 237,
560 A.2d 365 (1989).....16

Page

State v. Pinegar, 583 S.W.2d 217
(Mo. App. 1979).....18

State v. Smith, 88 Wash. 2d 127,
559 P.2d 970, cert. denied,
434 U.S. 876 (1977).....17

State v. Waterhouse, 62 Or. App. 12,
659 P.2d 1013, cert. denied,
295 Or. 31, 665 P.2d 874,
cert. denied, 464 U.S. 853 (1983)....15

United States v. Botsch,
364 F.2d 542 (2d Cir. 1966),
cert. denied, 386 U.S. 937 (1967)....18

United States v. Buettner-Janusch,
646 F.2d 759 (2d Cir.),
cert. denied, 454 U.S. 830 (1981)....15

United States v. Chadwick,
433 U.S. 1 (1977).....11, 19, 20

United States v. D'Antoni,
856 F.2d 975 (7th Cir. 1988).....15

United States v. Diggs,
544 F.2d 116 (3d Cir. 1976)
(en banc).....18

United States v. Falcon,
766 F.2d 1469
(10th Cir. 1985).....15, 17

United States v. Matlock,
415 U.S. 164 (1974).....14, 16

United States v. Most,
876 F.2d 191 (D.C. Cir. 1989).....16

Page

United States v. Prescott,
480 F. Supp. 554
(W.D. Pa. 1979).....17

United States v. Sellers,
667 F.2d 1123 (4th Cir. 1981).....15

United States v. Wilson,
536 F.2d 883 (9th Cir.),
cert. denied, 429 U.S. 982 (1976)....16

Constitutional Provision

United States Constitution,
Fourth Amendment.....passim

Statute

28 U.S.C. § 1257(a).....2

Miscellaneous

W. LaFave, Search and Seizure
(2d ed. 1987).....13

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OCTOBER TERM, 1991

STATE OF MARYLAND,

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v.

LENARD BERNARD OWENS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, Owens v. State, 322 Md. 616, 589 A.2d 59 (1991), reversing Respondent's conviction, is reproduced in Appendix A (1a-58a).

The reported opinion of the Court of Special Appeals of Maryland, Owens v. State, 83 Md. App. 353, 574 A.2d 362 (1990), affirming Respondent's conviction, is reproduced in Appendix B (59a-92a).

The transcribed opinion of the trial court, denying Respondent's motion to suppress, is reproduced in Appendix C (93a-103a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland reversing Respondent's conviction was filed on April 29, 1991. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the afternoon of February 1, 1988, Detective Nelson Morgan Sheppard, Jr., then assigned to the Washington County, Maryland Narcotics Task Force, went to the apartment of Ms. Marla Gardin. (E. 22-23).[1] Sheppard told Ms. Gardin that he had information that four men had left drugs in her apartment earlier that day. (E. 23).

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[1] References to the record herein are to the Joint Record Extract filed in the Court of Appeals of Maryland.

Detective Sheppard asked for and received Ms. Gardin's permission to search the apartment. (E. 24-25). During the search, Detective Sheppard opened the luggage that Gardin indicated had been left by the men in her living room. (E. 25-26). One item, a zippered, nylon Adidas bag belonging to Respondent Lenard Bernard Owens, was found to contain a large quantity of crack cocaine and currency. (E. 11, 26-27). As a result of this discovery, Owens ultimately was arrested and charged with possession with the intent to distribute cocaine and related offenses. (E. 4, 51).

A pre-trial hearing was held in the Circuit Court for Washington County, Maryland, pursuant to Owens's motion to suppress the drugs and money found during the search of his bag. (E. 51). Prior to the taking of any testimony, the prosecutor informed the suppression judge of the

State's intention to challenge Owens's standing to litigate the merits of the alleged Fourth Amendment violation. (E. 1). The testimony of Owens, Marla Gardin, and Detective Sheppard, as credited by the suppression judge, disclosed the following.

Marla Gardin was the sole lessee of an apartment at 52 Murph Avenue in Hagerstown, Maryland. (E. 13, 18). On the morning of February 1, 1988, Owens and three companions arrived at the apartment and asked Gardin if they could leave their luggage there while they looked for a place to stay. (E. 13, 16-20). Although Owens and another of the men previously had been overnight guests in Gardin's apartment, the four did not indicate a desire to stay there the night of February 1. (E. 17-18). Instead, as Gardin testified, "they just wanted to leave their bags and they

would be back to get it, they was going to look for a room or something." (Id.). Gardin gave Owens and his friends permission to leave their bags in her living room. (E. 20). Gardin never opened the bags, nor did she ask for or receive permission to open them. (Id.).

Owens was not sure when he would return to pick up his bag. (E. 12). Indeed, he testified that he was going to return for his luggage "whenever [he] had time to." (E. 5). Owens was not given a key to Gardin's apartment, (E. 9), and would have required Gardin's permission to enter the apartment to reclaim his luggage. (19a).

That afternoon, Detective Sheppard arrived at Gardin's apartment, identified himself, and recounted his information that four men had left drugs there. (E. 23). Detective Sheppard requested Gardin's

permission to search the apartment. He showed her a "permission to search" form, filled it out, explained it to her, and secured her signature on it. (E. 14-15, 23-24). After signing the form, Gardin pointed to the luggage, which was located in the living room, and advised Detective Sheppard that "they had just brought it here this morning and if there's any drugs it would be in there." (E. 25). Gardin explained to Detective Sheppard that "they" were "Nard" (Owens), Wink, Waddell, and a fourth man whose name she did not know. (Id.).

Gardin further advised Detective Sheppard that the men had been to her apartment before, that they had come there that morning after arriving from Florida, and that they would come to her apartment when they came to town to sell "crack." (E. 28). Often the men would leave the drugs

in her apartment, but on some occasions would take the drugs "on the street" with them. (Id.).

While a second police officer searched Ms. Gardin's apartment, Detective Sheppard examined the luggage. (E. 21, 26). One of the items of luggage was a blue nylon Adidas bag with an identification tag displaying Owens's name and address. (E. 26, 28-29). The bag was zipped closed. (E. 11, 28). Inside the bag were several white tube socks stuffed into a pair of shoes. Inside the socks were several plastic bags containing crack cocaine having an estimated street value of between $78,000 and $97,000, and $1,880 in cash. (E. 26-27, 31).

Owens sought suppression of the drugs and money on the theory that he retained an expectation of privacy in his bag after leaving it in Gardin's apartment, and that

she did not have the authority to consent to the bag's search. (E. 32-43). The suppression court denied Owens's motion to suppress, finding that Owens did not have standing to contest the search of either Ms. Gardin's apartment or anything inside it, including the bag. (100a-102a). The court ruled in the alternative that, even if Owens did have standing to challenge the search of his bag, Gardin had the authority to consent to the search of her apartment and everything in it. (102a). The court reasoned that Gardin's authority over the bag was akin to that of a gratuitous bailee and that her consent, being both knowing and voluntary, enabled the police lawfully to search the bag and seize its contents without a warrant. (94a-103a).

The State introduced the drugs and money at Owens's trial. On March 14, 1989, a jury found Owens guilty of possession

with intent to distribute cocaine, and on September 14, 1989, the court sentenced him to 20 years in prison and a $10,000 fine. (E. 52). The Court of Special Appeals of Maryland affirmed the judgment of the suppression court, essentially adopting its reasoning. (80a-82a, 88a-92a).

In a four to three decision, the Court of Appeals of Maryland reversed Owens's conviction. The court ruled that, although Owens had no expectation of privacy in the premises, he did retain a legitimate expectation of privacy in the bag and its contents. (19a-20a, 26a). It further ruled that Ms. Gardin did not possess common authority over Owens's bag and had no other sufficient relationship to its contents to validate her consent to its search. (32a-33a). The court thus held that, while the police had probable cause to seize Owens's bag, they nonetheless were prohibited under

the rule espoused in United States v. Chadwick[2] and Arkansas v. Sanders[3] from searching it without first obtaining a warrant. (27a-32a).

The three dissenting judges would have affirmed the search of Owens's bag on any of three bases. First, Ms. Gardin could and did give valid consent to the search of the bag. Second, even if Gardin could not lawfully consent to the search, the police acted reasonably based upon her apparent authority to consent. Finally, Owens enjoyed no reasonable and legitimate expectation of privacy in the bag. (36a-37a).

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[2] 433 U.S. 1 (1977).

[3] 442 U.S. 753 (1979).

REASONS FOR GRANTING THE WRIT

I. The Maryland Court of Appeals has wrongly decided a novel issue of great public importance.

The search conducted here was reasonable under the Fourth Amendment. Owens left his bag, unlocked and containing illegal drugs, in a friend's living room without indicating when he would return, and without retaining a right of access to the apartment to reclaim the bag. The friend, who suspected the bag contained drugs, identified it for the police and gave them unqualified consent to search the premises and the bag itself. Furthermore, when the police opened the bag, they were armed not only with consent but with probable cause to believe that it contained drugs.

Notwithstanding the reasonableness of the police conduct in searching the bag, the Court of Appeals found the search

violative of the Fourth Amendment. In so doing, the court has given safe harbor to drug dealers who commonly use third party premises to store large quantities of drugs while plying their trade elsewhere. Given the magnitude and frequency of such drug operations, the decision by the Maryland court has far-reaching consequences.

Not only is this case of great public importance, it presents an issue not previously addressed by this Court. As framed by Professor LaFave, the issue is whether and when the relationship of a bailee to bailed property is "'sufficient' to make the bailee's consent to a search of the bailed property effective against the bailor-defendant." 3 W. LaFave, Search and Seizure § 8.6(a) at 312 (2d ed. 1987). In addition to the bailment issue, this case presents the equally novel issue of whether the bright line rule announced in

California v. Acevedo, 111 S. Ct. 1982 (1991), should be extended to include the warrantless search of any container that the police have probable cause to believe contains contraband.

II. The lower courts are in conflict on the issue of whether a bailee can consent to the search of bailed property.

The sharply divergent positions taken by the seven members of Maryland's highest court reflect the conflicting approaches of the state and federal courts that have addressed searches of gratuitously bailed property. In grappling with this issue, lower courts have taken disparate approaches with understandably varied results.

Most courts have analyzed the issue by reference to the "common authority" principle of third party consent first announced in United States v. Matlock, 415 U.S. 164 (1974), and a majority have held

that a bailee is authorized to consent to a search of bailed property. In factual situations closely analogous to that here, the Fourth, Seventh, and Tenth Circuits have held that the resident of an apartment may consent to the search of personal effects left there by a non-resident. United States v. D'Antoni, 856 F.2d 975, 983 (7th Cir. 1988); United States v. Falcon, 766 F.2d 1469, 1474-75 (10th Cir. 1985); United States v. Sellers, 667 F.2d 1123, 1126 (4th Cir. 1981). Other courts likewise have upheld bailee consent searches. See, e.g., United States v. Buettner-Janusch, 646 F.2d 759, 765-66 (2d Cir.), cert. denied, 454 U.S. 830 (1981); State v. Buschkopf, 373 N.W.2d 756, 767-68 (Minn. 1985); State v. Waterhouse, 62 Or. App. 12, 659 P.2d 1013, 1015, cert. denied, 295 Or. 31, 665 P.2d 874, cert. denied, 464

U.S. 853 (1983); State v. Chenette, 151 Vt. 237, 560 A.2d 365, 373-74 (1989).

In contrast, the Ninth and District of Columbia Circuits take the position that the common authority principle of Matlock forecloses searches like that at issue here. In United States v. Wilson, 536 F.2d 883, 884-85 (9th Cir.), cert. denied, 429 U.S. 982 (1976), the Court of Appeals for the Ninth Circuit held that a third party had neither "common authority" over nor "mutual use" of suitcases left in her apartment and, thus, could not consent to their search. The Court of Appeals for the District of Columbia Circuit, declaring that the concept of bailee consent "finds no support in circuit precedent," held that a store employee could not consent to the search of a bag that a customer had checked with the cashier. United States v. Most, 876 F.2d 191, 200 (D.C. Cir. 1989). See

also United States v. Prescott, 480 F. Supp. 554, 560 (W.D. Pa. 1979) (YMCA employee did not have authority to consent to search of duffle bag left by owner, even where owner did not rent room or pay for bailment); Commonwealth v. Silo, 480 Pa. 15, 389 A.2d 62, 66-67 (1978), cert. denied, 439 U.S. 1132 (1979) (hospital employee cannot consent to search of patient's clothing, even though employee had access to and control over clothing).[4]

Still other courts have reasoned that the bailor enjoys no legitimate expectation of privacy in the bailed property that is left, unsecured, in the possession of the bailee. See, e.g., United States v. Falcon, 766 F.2d at 1476; Sartain v. United

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[4] On facts virtually identical to those in Silo, the Supreme Court of Washington reached the opposite result. State v. Smith, 88 Wash. 2d 127, 559 P.2d 970, 976, cert. denied, 434 U.S. 876 (1977).

States, 303 F.2d 859, 862-63 (9th Cir.), cert. denied, 371 U.S. 894 (1962); Cooper v. State, 492 So. 2d 1059, 1061-62 (Fla. 1986) (per curiam), cert. denied, 479 U.S. 1101 (1987). Contra State v. Pinegar, 583 S.W.2d 217, 220 (Mo. App. 1979).

Using a different line of reasoning altogether, some courts have upheld third party consent searches on the theory that the bailee has a right to exculpate himself to avoid criminal liability. United States v. Botsch, 364 F.2d 542, 547-48 (2d Cir. 1966), cert. denied, 386 U.S. 937 (1967); Commonwealth v. Latshaw, 481 Pa. 298, 392 A.2d 1301, 1306 & n.5 (1978), cert. denied, 441 U.S. 931 (1979); see also United States v. Diggs, 544 F.2d 116, 119-22 (3d Cir. 1976) (en banc) (four judges would have applied Botsch rationale).

A definitive decision by this Court is necessary to resolve the conflict among the

lower courts and fill a void in Fourth Amendment jurisprudence. This case is the appropriate vehicle for doing so.

III. This case presents an opportunity to extend the Acevedo bright line rule.

Aside from the third party consent issue presented by this case, there exists an independent and equally important reason for the Court to grant the petition. As the Maryland Court of Appeals acknowledged, the police had probable cause to believe Owens's bag contained contraband. (31a). Applying Arkansas v. Sanders, 442 U.S. 753 (1979), and United States v. Chadwick, 433 U.S. 1 (1977), however, the Maryland high court found the search of the bag to be illegal because the police had failed to obtain a search warrant. (31a-36a).

In the context of an automobile search, this Court recently ruled that no warrant was necessary to search a closed

container so long as probable cause existed to search the car. California v. Acevedo, 111 S. Ct. at 1991. The Court overruled Arkansas v. Sanders--one of the cases relied upon by the Maryland Court of Appeals--and in so doing fashioned a bright line rule to guide police searches of cars.

As three members of the Court noted, the reasoning used to uphold the search of a container in a car applies equally to the search of a container outside of a car. 111 S. Ct. at 1993-94, 2001 (Scalia, J., concurring; Stevens, J., dissenting, joined by Marshall, J.). Accordingly, where the police possess probable cause to believe that the container houses drugs or other contraband, and they are lawfully at the vantage point to observe and seize the container, they likewise should be permitted to search it without a warrant. With this case, the Court can reexamine

United States v. Chadwick and extend the Acevedo bright line rule beyond the narrow confines of automobile searches.

CONCLUSION

The Maryland Court of Appeals' decision in this case is wrong. This Court should take the opportunity to correct the error below, resolve the existing conflict among the lower courts, and announce the appropriate Fourth Amendment standard to be applied in this and like cases.

For these reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
MARY ELLEN BARBERA
SARAH E. PAGE
Assistant Attorneys General

Counsel for Petitioner

* Counsel of Record
July 26, 1991

APPENDIX

CONTENTS OF APPENDIX

Page

APPENDIX A:

Reported opinion of the Court of Appeals of Maryland, Owens v. State, 322 Md. 616, 589 A.2d 59 (1991).....1a

APPENDIX B:

Reported opinion of the Court of Special Appeals of Maryland, Owens v. State, 83 Md. App. 353, 574 A.2d 362 (1990).....59a

APPENDIX C:

Transcript of suppression hearing held in the Circuit Court for Washington County, Maryland on February 7, 1989.....93a

APPENDIX A

LENARD BERNARD OWENS

v.

STATE OF MARYLAND.

No. 103, Sept. Term, 1990.

Court of Appeals of Maryland.

April 29, 1991.

Argued before MURPHY, C.J., ELDRIDGE, RODOWSKY, McAULIFFE and CHASANOW, JJ., and MARVIN H. SMITH and CHARLES E. ORTH, Jr., Associate Judges of the Court of Appeals (retired), Specially Assigned.

CHARLES E. ORTH, Jr., Judge, Specially Assigned.

Marla Gardin, a friend of Lenard Bernard Owens, permitted him to leave his

luggage in her apartment. The luggage was a nylon bag with a zipper closure. The police, without a warrant, seized the bag in Owens's absence and searched it. They found crack cocaine and a large sum of cash. Owens was charged in the Circuit Court for Washington County with various violations of the controlled dangerous substances laws. He filed a pretrial motion to suppress the evidence, and, after a plenary hearing, the motion was denied. A jury convicted him of possession of cocaine with the intent to distribute. The court imposed a sentence of imprisonment for a term of 20 years and ordered him to pay a fine of $10,000 and $280 costs. The judgment was affirmed by the Court of Special Appeals. Owens v. State, 83 Md. App. 353, 574 A.2d 362 (1990). We granted Owens's petition for the issuance of a writ of certiorari.

I

We glean the details of Owens's misadventure from the proceedings at a hearing on the pretrial motion to suppress the evidence. Testimony was received from Owens, Gardin, and Nelson Morgan Sheppard, Jr., a detective with the Hagerstown Police Department, experienced in the investigation of drug violations.

We learn from Owens that he was a resident of Fort Pierce, Florida, and made frequent trips to Hagerstown, Maryland. On six or seven occasions he stayed at Gardin's apartment. He characterized his relationship with Gardin as "[j]ust another person that I know, a friend." He came to Hagerstown from Florida on 31 January 1988, accompanied by several other men. This time, however, he went to the home of another friend, "Miss Elizabeth," whose last name he did not know, intending to

stay there while in Hagerstown. He left his bag there. He asked Gardin to get the bag and take it to her apartment. He said he made the request so he could change to clothing that was in the bag. He did not give Gardin permission to open the bag, he "simply asked her to bring it over to her house." He spent the night of 31 January 1988 in Gardin's apartment because it was too late to go to Miss Elizabeth's house. He did not have a key to Gardin's apartment, and she let him in when he knocked on the door. He spent the night on a sofa in the living room. When Owens departed the apartment the next morning, he left the bag in the living room with Gardin's permission, intending to pick it up "later on whenever I had time to." The bag's zipper was closed, and he insisted that he never gave Gardin "permission to go into [his] luggage or open it in any way,

shape or form." A luggage tag bearing his name and address was attached to the outside of the bag. He "gave [Gardin] some money for staying there, like I gave her money to buy some needs for her and the kid. I mean, as far as paying, I gave her money to go buy breakfast."

Gardin testified at the call of the State. She was the listed tenant of the premises, paying a monthly rental of $37 (she was on public assistance). She lived there with her two-year-old daughter. On 1 February 1988, Owens and several other men, some of whom were known to her from previous visits, arrived at her apartment with three pieces of luggage. Owens and one of the men had spent the night there before, as recently as two weeks ago, but this time they did not indicate that they intended to spend the night. "They said they was going to leave, could they leave

their bags 'cause they was going to look for a room and I said yes." After they left, the police came to her apartment and asked if they could search it. She had no objection and told them so. She executed a form by which she acknowledged her awareness of her constitutional rights, consented to the search of her apartment, and authorized the police to "take from my premises and property any ... things which they desire as evidence for criminal prosecution in the case or cases under investigation." The document was received in evidence. The pieces of luggage brought by Owens and his companions were in the living room. She did not point them out to the officers--"they were setting right there for them to see them." The police searched the apartment and the luggage with her permission. Owens's bag was closed. She had not opened it; Owens had not given

her permission to open it. Gardin denied that she had brought any of the pieces of luggage to the apartment.

Sheppard testified on behalf of the State. He and other officers went to Gardin's apartment, without a search warrant, on 1 February 1988. Gardin answered the door. Sheppard identified himself and

> indicated to her that [he] had received information that there were drugs in her apartment that was brought there by four subjects who just arrived there that morning.

She stated that she had no problem with the police coming in and searching the house. She executed a consent to search form. She then

> pointed to some luggage which was located on the southwest corner of the living room and she stated "they had just brought it here this morning and if there's any drugs it would be in there." I then asked her who "they" was and she related to me that there were

> four black males, Nard [Owens], Wink, Waddell and the fourth one was a new guy that she didn't know his name.

She did not "indicate at any time that any of those individuals had spent the preceding day or night there," but she acknowledged that all except "the new guy" had been there on prior occasions. A search of the bag with Owens's name tag on it revealed two pairs of "tube" socks stuck into shoes. Inside the socks were plastic bags. One bag contained 436 pieces of crack; another 246 pieces of crack; another 291 pieces of crack, for a total of 325.79 grams. In a fourth sock was $1880 in United States currency, in denominations not smaller than $20. Sheppard summed up what he alleged Gardin had told him:

> Basically the only thing was that she told me that they had come to the apartment that morning after they had just arrived from Florida, and her response also was that they would come to her

> apartment when they would come to town to sell crack, oftentimes leaving some in her apartment, but oftentimes taking it out on the street with them.

It was elicited from Sheppard that crack is usually not sold by the gram on the street but in $20 "pieces." Now, he explained, "with the way the weight has been fluctuating, [the value] will run between $78,000 and $97,000 for that package."

II

A

Owens's motion to suppress was founded on the Fourth Amendment to the Constitution of the United States, which is applicable to state prosecutions under the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961). The Fourth Amendment has two parts. First, it guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures." Second, it provides that "no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." The Supreme Court

> has interpreted the Amendment to include the requirement that normally searches of private property be performed pursuant to a search warrant issued in compliance with the Warrant Clause.

Arkansas v. Sanders, 442 U.S. 753, 758, 99 S.Ct. 2586, 2590, 61 L.Ed.2d 235 (1979).

> In the ordinary case, therefore, a search of private property must be both reasonable and pursuant to a properly issued search warrant. The mere reasonableness of a search, assessed in the light of surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment.

Id. Thus, the Supreme Court has made clear that a search or seizure conducted without

the benefit of a warrant supported by probable cause is per se unreasonable under the Fourth Amendment, subject only to a few jealously guarded and carefully drawn exceptions. Gamble v. State, 318 Md. 120, 123, 567 A.2d 95 (1989).

B

The judge hearing the motion found that no one but Gardin had a proprietary interest in the apartment. She had the "exclusive and sole right in that apartment respecting the Fourth Amendment rights." He found that Gardin gave the police officers permission to search the premises and that the consent was valid. Noting that "[b]asically the Fourth Amendment is a personal right," he likened Owens's leaving the bag in Gardin's apartment to a "gratuitous bailment." The judge observed:

> [T]he fact that these [men] who apparently come up here from Florida and flop their suitcases

> down in Miss Gardin's apartment without any arrangements whatsoever, they have no interest in that apartment, no proprietary interest whatsoever, and they flop their suitcases in there and then just go off, intending to return hours or days later, does not give them any Fourth Amendment right to challenge the search of her apartment. She is the person and the sole and exclusive person who could grant consent to search that apartment under the evidence presented.

The judge opined:

> The Fourth Amendment and legitimate expectation of privacy was in the area searched and the person who had a reasonable expectation of privacy was Miss Gardin but not [Owens].

The judge explicated his belief:

> In short, I don't see where [Owens] has shown that he had a legitimate or reasonable expectation of privacy in the area that was searched here, which was Miss Gardin's apartment. When she gave permission to search, she didn't give permission to search part of her apartment, she gave permission to search the whole apartment and they had the right to search. They could look in bureau drawers, they could lift the mattress and look under the

> mattress; they could look under the beds; they could look in containers. If there were ten containers there, they didn't have permission to search seven containers but not these three.

The judge exclaimed:

> It would be a fine how-do-you-do if you could simply stick a label on a suitcase and create an expectation of privacy. Then all the person would have to do would be to stick someone else's name on the container where they kept anything that was illegal and the police couldn't enter or look in that container because it would appear to the police that somebody else had a proprietary interest in it. I think that is a very tortured interpretation that you try to invest some reasonable legitimate expectation of privacy in that suitcase the way this person handled it in this case.

The judge "specifically" found that Owens did not have standing to object, but, "for purposes of decision," he assumed that Owens did have standing. Even on that assumption, however, the judge reached the same conclusion:

> No personal Fourth Amendment right of [Owens] was violated when the police have the consent to search her apartment and everything therein.

The judge denied the motion to suppress.

III

Owens's petition for a writ of certiorari presented one question:

> Did the trial court err in holding that [Owens] had neither standing to contest a search of, nor a reasonable expectation of privacy in, a piece of luggage he placed in a friend's living room, temporarily?

A

> [A]s a general proposition, the issue of standing involves two inquiries: first, whether the proponent of a particular legal right has alleged "injury in fact," and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim of relief upon the rights of third parties.

Rakas v. Illinois, 439 U.S. 128, 139, 99 S.Ct. 421, 428, 58 L.Ed.2d 387 (1978) (citations omitted). The Court made clear

that it was not casting "the least doubt" on cases which recognize this general proposition. Id. "But," the Court asserted,

> this Court's long history of insistence that Fourth Amendment rights are personal in nature has already answered many of these traditional standing inquiries, and we think that definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.

Id. at 140, 99 S.Ct. at 428. "Analyzed in these terms," the Court explained,

> the question is whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it.

Id. "That inquiry," the Court continued,

> in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.

Id. "In defining the scope of that interest, ... arcane distinctions developed

in property and tort law between guests, licensees, invitees, and the like, ought not to control." Id. at 143, 99 S.Ct. at 430. The interest, therefore, does not depend upon a property right in the place or item invaded, but in a legitimate expectation of privacy in the place or item. Id. Mr. Justice Powell, joined by Chief Justice Burger, observed in his concurring opinion in Rakas, that this view is

> a sounder standard for determining the scope of a person's Fourth Amendment rights: Only legitimate expectations of privacy are protected by the Constitution.

Id. at 151, 99 S.Ct. at 434. In United States v. Payner, 447 U.S. 727, 731, 100 S.Ct. 2439, 2444, 65 L.Ed.2d 468 (1980), the Court

> reaffirmed the established rule that a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure

> violated the defendant's own constitutional rights.

"And," the Court stated,

> the defendant's Fourth Amendment rights are violated only when the challenged conduct invaded his legitimate expectation of privacy rather than that of a third party.

Id. (emphasis in original). An expectation of privacy may be subjective, and it is legitimate if it is one that society is prepared to recognize as reasonable. Minnesota v. Olson, 495 U.S. ___, ___, 110 S.Ct. 1684, 1687, 109 L.Ed.2d 85 (1990).

B

As we have seen, the hearing judge found that the "exclusive and sole right in that apartment respecting the Fourth Amendment rights" was in Gardin. Although Owens claimed that he spent the night in the apartment preceding the appearance of the police, Gardin said that he had not. The hearing judge, performing his function

to judge the credibility of the witnesses, resolved the contrariant testimonies. He obviously believed Gardin. When the judge said that Owens and his companions

> come up here from Florida and flop their suitcases down in Miss Gardin's apartment without any arrangements whatsoever ... they flop their suitcases in there and go off, intending to return hours or days later, ...

the clear import was that the judge thought that Owens had not, in fact, spent the night in Gardin's apartment. This judgment on the evidence was not clearly erroneous. Md. Rule 8-131(c). Therefore, we accept that Owens did not enjoy the status of an overnight guest which "alone [would have been] enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." Minnesota v. Olson, 110 S.Ct. at 1688. Owens had no other claim to an expectation of privacy with respect to the

premises. He was not a guest of Gardin, paying or free. He did not have a key to the premises. He could lawfully enter the apartment only with Gardin's permission; he had no authority to come and go as he pleased. Gardin had complete dominion and control over the apartment and could exclude others, including Owens, from it. This dominion and control was not shared by Owens.

On our independent constitutional appraisal of the record, Riddick v. State, 319 Md. 180, 183, 571 A.2d 1239 (1990), we hold that, in the circumstances here, Gardin's Fourth Amendment rights, not those of Owens, would be violated by an invalid search of the apartment. The relationship between Owens and Gardin and the apartment did not give rise to such an expectation of privacy in the apartment, so far as Owens was concerned, that "society is prepared to

recognize as 'reasonable.'" Olson, 110 S.Ct. at 1687. The officers were lawfully on the premises. Gardin's consent to a search of her apartment was valid. Owens's luggage was in plain view. He had no legitimate expectation of privacy in the apartment. It follows that, in those circumstances, the mere observation of the bag did not offend the Fourth Amendment. Therefore, the bag was lawfully in the hands of the officers. The question is whether the officers could then forthwith search the bag without impinging on Owens's Fourth Amendment rights.

C

We bear in mind that it is not a "place" which is constitutionally protected against unreasonable searches and seizures.

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public,

> even in his own home or office, is not a subject of Fourth Amendment protection.

Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).

> But what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. at 351-352, 88 S.Ct. at 511. The apartment was accessible at the whim of Gardin, so, as far as Owens was concerned, the apartment was accessible to the public. He had no control whatsoever over whom Gardin permitted to enter the apartment, and the record contains no indication that he requested that she restrict access to the premises. It does not follow, however, that, therefore, Owens had no legitimate expectation of privacy in the contents of the bag.

It has been long established that

> [j]ust as the Fourth Amendment "protects people, not places," the

> protections a judicial warrant offers against erroneous governmental intrusions are effective whether applied in or out of the home.

United States v. Chadwick, 433 U.S. 1, 9-10, 97 S.Ct. 2476, 2482, 53 L.Ed.2d 538 (1977). Over a century ago the Court included within the reach of the Warrant Clause printed matter travelling through the mails within the United States. Ex parte Jackson, 96 U.S. 727, 733, 244 L.Ed. 877 (1878). In Chadwick, 433 U.S. at 10, 97 S.Ct. at 2483, the Court noted that it "reaffirmed Jackson in United States v. Van Leeuwen, 397 U.S. 249 [90 S.Ct. 1029, 25 L.Ed.2d 282] (1970), where a search warrant was obtained to open two packages which, on mailing, the sender had declared contained only coins." The Court went on to point out:

> Judicial warrants have been required for other searches conducted outside the home. E.g.,

> Katz v. United States, 389 U.S. 347 [88 S.Ct. 507, 19 L.Ed.2d 576] (1967) (electronic interception of conversation in public telephone booth); Coolidge v. New Hampshire, 403 U.S. 443 [91 S.Ct. 2022, 29 L.Ed.2d 564] (1971) (automobile on private premises); Preston v. United States, 376 U.S. 364 [84 S.Ct. 881, 11 L.Ed.2d 777] (1964) (automobile in custody); United States v. Jeffers, 342 U.S. 48 [72 S.Ct. 93, 96 L.Ed. 59] (1951) (hotel room); G.M. Leasing Corp. v. United States, 429 U.S. 338 [97 S.Ct. 619, 50 L.Ed.2d 530] (1977) (office); Mancusi v. DeForte, 392 U.S. 364 [88 S.Ct. 2120, 20 L.Ed.2d 1154] (1968) (office).

Chadwick, 433 U.S. at 10-11, 97 S.Ct. at 2483. Those cases, the Court stated, "reflect the settled constitutional principle ... that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interests found inside

the four walls of the home."[1] Id. at 11, 97 S.Ct. at 2483. In Chadwick, personal effects were placed inside a double-locked footlocker. The Court declared that this "manifested an expectation that the contents would remain free from public examination." Id. It explained, "No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause." Id. The Court refused to extend the rationale of its automobile search cases to warrantless searches of luggage. It expressed the view that "[i]n sum, a person's expectations of privacy in

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[1] "This is not to say," the Court warned, "that the Fourth Amendment translates precisely into a constitutional privacy right." United States v. Chadwick, 433 U.S. 1, 11, n. 6, 97 S.Ct. 2476, 2483, n.6, 53 L.Ed.2d 538 (1977).

personal luggage are substantially greater than in an automobile." Id. at 13, 97 S.Ct. at 2484. Nor did "the footlocker's mobility justify dispensing with the added protections of the Warrant Clause." Id. See also Arkansas v. Sanders, 442 U.S. at 763-764, 99 S.Ct. at 2592-2593. The Court noted that the owners'

> principal privacy interest in the footlocker was, of course, not in the container itself, which was exposed to public view, but in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker.

Chadwick, 433 U.S. at 13-14, n. 8, 97 S.Ct. 2485, n.8. The Court explained:

> Though surely a substantial infringement of [the owners'] use and possession, the seizure did not diminish [the owners'] legitimate expectation that the footlocker's contents would remain private.

Id. In Sanders, the Court affirmed the view expressed in Chadwick and applied it

to an unlocked suitcase containing marihuana. Furthermore, the Court declaimed:

> In the ordinary case ... a search of private property must be both reasonable and pursuant to a properly issued search warrant.

442 U.S. at 758, 99 S.Ct. at 2590. The Court declared:

> The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment.

Id.

We hold that Owens had an expectation of privacy in the bag which society is prepared to recognize as reasonable. As the hearing court suggested, the circumstances under which Owens left the bag in the apartment may be likened to a gratuitous bailment. LaFave, Search and Seizure (1987 ed.) § 11.3(c) at 305, stated that such view "would seem to square with

the Mancusi [v. DeForte, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968)] expectation-of-privacy test." Compare Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). But see, LaFave, id. at 312. There is an expectation of privacy because the bailor has sought to maintain the security and privacy of his effects in a place he regarded as a safe place for storage. LaFave points out, "Mere concealment of goods on the premises of another by trespass would not suffice, and of course the defendant must not have sold or otherwise abandoned his interest in those goods." § 11.3(c) at 305-306.[2] As was

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[2] There is no suggestion that Owens had sold the crack and the State conceded that there was no "issue of abandonment here." The prosecutor told the court:

> I think if we get beyond the issue of standing [of Owens to object] then we come to the fundamental

Cont'd

noted in Sanders, 442 U.S. at 762, 99 S.Ct. at 2592 and in Chadwick, 433 U.S. at 13, 97 S.Ct. at 2484, and United States v. Block, 590 F.2d 535, 541 (4th Cir.1978), luggage is a common repository for one's personal effects, and, therefore, is inevitably associated with the expectation of privacy. The bag here was zippered closed, and its contents were not exposed to public view. Both Owens and Gardin testified that Owens had not given Gardin permission to open the bag. The testimony of the police officers did not conflict with their testimony on that point. There was a tag affixed to the bag bearing Owens's name and address, making known that it was his

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> issue--is there reasonable expectation of privacy under the facts and circumstances which are before the court.

For a discussion of abandonment and the Fourth Amendment, see Duncan and Smith v. State, 281 Md. 247, 261-263, 378 A.2d 1108 (1977).

private property. Nevertheless, the police opened the bag forthwith and seized its contents. This action, not supported by a warrant based on probable cause, violated Owens's rights under the Fourth Amendment. As we have seen, the consent by Gardin to a search of her apartment empowered the police to seize the bag. Ordinarily, the police could not search Owens's bag without the authorization of a search warrant. But Gardin's consent intervened. Gardin forewent her Fourth Amendment rights as to her apartment by consenting to the search. Our inquiry proceeds to whether her consent carried over to Owens with respect to the contents of the bag he left in her apartment.

IV

As we have seen, the Supreme Court has made clear that a search or seizure conducted without the benefit of a warrant

supported by probable cause is per se unreasonable under the Fourth Amendment, subject to only a few exceptions. Gamble v. State, 318 Md. at 123, 567 A.2d 95.

> "But it is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."

Id., quoting Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-2044, 36 L.Ed.2d 854, 858 (1973). See Doering v. State, 313 Md. 384, 401-402, 545 A.2d 1281 (1988). "The burden of proving that the consent was freely and voluntarily given is upon the State." Id. at 401, 545 A.2d 1281.

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the

> premises or effects sought to be inspected.

United States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974). See Frazier v. Cupp, 394 U.S. 731, 740, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969).

Without the presence of the exception of consent, the warrantless search was invalid. Owens was not even present. No exigent circumstances justified the search. There was no potential danger to the officers calling for an immediate search, and not the slightest chance that the contents of the bag could be removed before a warrant was obtained. Even though the police may have had ample probable cause to believe that the luggage contained contraband, as was also the case in Sanders, "[w]ith the [bag] safely immobilized, it was unreasonable to undertake the additional and greater

intrusion of a search without a warrant." Chadwick, 433 U.S. at 13, 97 S.Ct. at 2485. Of course, it was more convenient for the officers to search the bag then and there, but convenience is not the criterion by which the Fourth Amendment is tested.

> The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral [judicial officer], which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime."

Id. at 9, 97 S.Ct. at 2482, quoting Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948).

The bottom line is that the State did not meet its burden of proving that Owens consented to the search of his bag. Gardin did not possess common authority over Owens's bag and had no other sufficient relationship to its contents to validate

any consent by her to search the bag. We hold that, in the circumstances, the warrantless search of Owens's luggage was unreasonable and, therefore, violated his Fourth Amendment rights. Thus, the denial of the motion to suppress was prejudicially erroneous and entitles Owens to a new trial.

Searches and seizures deeply concerned the colonists. Their concern grew in large measure out of their experience with writs of assistance and their memories of the general warrants used in England. It was clear to the Supreme Court, however, that the "Framers [of the Constitution] were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth." Chadwick, 433 U.S. at 9, 97

S.Ct. at 2482. We are well aware, as is the Supreme Court, that

> [e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected.

Rakas, 439 U.S. at 137, 99 S.Ct. at 427. But in order to safeguard that most fundamental value of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," it is sometimes necessary that the scoundrel go free. This is apparent from the many cases concerned with the Fourth Amendment in which the courts were faced with the dilemma of the rights of the individual vis-a-vis the interests of society.

> Although the general principles applicable to claims of Fourth Amendment violations are well settled, litigation over requests for suppression of highly

> relevant evidence continues to occupy much of the attention of courts at all levels of the state and federal judiciary. Courts and law enforcement officials often find it difficult to discern the proper application of these principles to individual cases, because the circumstances giving rise to suppression requests can vary almost infinitely. Moreover, an apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment rights.

Sanders, 442 U.S. at 757, 99 S.Ct. at 2589. The evidence, showing that Owens possessed cocaine, if admissible, was legally sufficient to establish that he was a lawbreaker. Under our system of criminal justice, however, he may not be convicted and punished upon evidence obtained by enforcement authorities contrary to the Fourth Amendment. The end cannot justify the means. It is not controlling that what was found was unlawful; but it is decisive that how it was found was unconstitutional.

Were it otherwise, the guarantee of the Fourth Amendment would be rendered meaningless, and the integrity of our system of criminal justice of which we are justly proud, would be despoiled.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT WITH DIRECTION TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AND TO REMAND THE CASE TO THE LATTER COURT FOR A NEW TRIAL; COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY WASHINGTON COUNTY.

CHASANOW, J., dissents in which RODOWSKY and MARVIN H. SMITH, J., join.

CHASANOW, J., dissenting.

The majority holds that a drug dealer who leaves an unlocked bag containing over $75,000 worth of drugs at the home of a "friend" is the victim of an unlawful search when the friend authorizes the police to determine whether there are drugs on her premises. I would affirm the trial judge's ruling that the search was valid for any or all of the following reasons:

First, Ms. Gardin could give valid consent to a search of the bag. Second, even if Ms. Gardin lacked actual authority to consent to the search of the bag, the police acted reasonably when they searched based on Ms. Gardin's apparent authority to consent. Third, under the circumstances in the instant case, Owens had no reasonable and legitimate expectation of privacy in the bag.

I. MS. GARDIN'S CONSENT

We should affirm the trial judge's holding that Ms. Gardin had the authority to consent to a search of this bag. The bag was left unlocked in Ms. Gardin's exclusive possession. It could be opened by simply unzipping a zipper. Ms. Gardin was never told she should not open the bag. She had no indication of when Owens would retrieve the bag, and the bag was not even accessible to Owens unless Ms. Gardin

allowed him into her home.

In United States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242, 249-50 (1974), a case involving consent to search given by a woman with whom the accused lived, the Supreme Court held that a third party may consent to a warrantless search where the third party possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected." Thus, a host, as the person who has the primary right of occupancy of the premises, may consent to a search of the area occupied by a guest over which he or she has common authority. United States v. Buckles, 495 F.2d 1377, 1381 (8th Cir.1974). In Buckles, the host validly consented to a search of her home, including the search of a jacket found therein that belonged to her guest, the defendant. Similarly, in State

v. Martin, 261 N.W.2d 341 (Minn.1977), the search of a closed tackle box was deemed proper. Martin, by virtue of his status as a guest, had "no reasonable expectation of privacy viz-a-viz [the host] as to any items he left in her apartment. Thus as long as the tackle box was in her apartment she could validly consent to its search." Id. at 344. In addition, see United States v. Miroff, 606 F.2d 777 (7th Cir.1979), cert. denied, 445 U.S. 928, 100 S.Ct. 1315, 63 L.Ed.2d 761 (1980), where the hosts validly consented to a search of their home, including a room temporarily occupied by guests. Police found stolen goods in shopping bags and in a closed garment bag belonging to the guests. The court noted that the hosts had previously requested of their guests that no stolen property be brought into their home and they were so assured. The guests were found to have

"assumed the risk that one with whom they shared the common area might properly permit that common area to be searched, particularly when the sharer was the dominant or controlling party in the general premises." Id. at 779. See also United States v. Carter, 569 F.2d 801, 805 (4th Cir.1977), cert. denied, 435 U.S. 973, 98 S.Ct. 1618, 56 L.Ed.2d 66 (1978) (defendant's employer and owner of truck validly consented to search where police found gun wrapped in a coat liner behind seat; "it was reasonable to recognize that [the owner] had the right to permit inspection and that Carter had assumed the risk that [he] might so do").

I believe that the search of Owens's bag was not violative of his Fourth Amendment rights. Ms. Gardin had sole authority and control over the bag when the police confronted her with their suspicion

that contraband was in her home. She should be able to consent to the seizure and search of a bag left in her living room. See United States v. Falcon, 766 F.2d 1469 (10th Cir.1985), where defendant's brother validly consented to a search of the premises, that consent extended to the playing by law enforcement officials of a cassette tape labelled "'Confidential, Do Not Play.'" The court concluded that the labelling evinced the defendant's

> "subjective expectation that what was on the tape would be safe from inspection by his brother or anyone his brother might permit to listen to it. That expectation, however, was objectively unreasonable. The tape was not locked away, hidden or sealed.... [His brother's] access to and control over the tape was absolute. He could have played it at any time.... We hold that, once the agents were justified in seizing the tape, no additional authority was necessary for the agents to play the tape."

Id. at 1476. See also White v. United States, 444 F.2d 724 (10th Cir.1971) (co-occupant of motel room had authority to consent to search of defendant's zippered bag). Owens had no access to the apartment or to the bag within the apartment, except with the permission of Gardin. Owens's bag was left unattended and unlocked. Gardin could have opened it herself or allowed anyone else to do so. The 7th Circuit Court of Appeals grappled with a similar situation in U.S. v. D'Antoni, 856 F.2d 975 (7th Cir.1988). The court concluded:

> "The defendant had moved his belongings into the apartment[] essentially for storage.... It is reasonable to believe that during this time the residents of the apartment who paid the rent and, it appears, were there continuously, could have found it necessary to move the defendant's belongings for a variety of reasons convenient to them. Had the defendant been concerned about the inviolability of his possessions he would not have left them unattended and unsecured. We

> believe that the residents of the apartment were fully able to consent to a search of the entire premises, including the bedroom where the defendant occasionally stayed."

Id. at 983.

In addition, Ms. Gardin was at most a gratuitous bailee. She should have the right to rescind that bailment when told by the police that someone may have secreted drugs in her apartment. After being notified by the police that they believed drugs had been left in her apartment, if Ms. Gardin did not take some affirmative action, she may thereafter be an accomplice in the possession of these drugs. It is only reasonable that Ms. Gardin should be able to demonstrate her innocence by authorizing the police to ascertain whether, in fact, there were drugs in her apartment and, if so, to remove them. She has the sole and exclusive possessory right

in the apartment and a legitimate interest in defending the integrity of her home. People should not be expected to subject themselves to potential criminal penalties for knowingly possessing contraband after being put on notice by the police that a bag left in their house by a casual friend is believed to contain drugs. It is reasonable to expect that they would authorize, if not insist on, a search of the bag and removal of controlled dangerous substances.

II. POLICE COULD REASONABLY RELY ON MS. GARDIN'S CONSENT

The police acted reasonably in searching the bag based on Ms. Gardin's consent. Ms. Gardin was left in the sole and exclusive possession of an unlocked zippered bag. Although acknowledging that the bag was left with her by someone else, Ms. Gardin freely consented to its

search. She never indicated either a reluctance to consent or the lack of authority to consent to the search. The police were reasonable in assuming that she had authority to open the unlocked bag or to consent to its search to determine whether she was the unwitting and unwilling repository of contraband. When Ms. Gardin learned of the police suspicion that the bag contained drugs, she could have removed the suspect bag from her apartment. Likewise, she could have demanded that the police remove the offending bag. Under the circumstances of this case, the police were entitled to assume she could authorize the search of the bag. The trial judge was not in error in finding that, since the bag was in Ms. Gardin's living room, in her exclusive possession, and secured only by a zipper, she had sufficient indicia of joint control over the bag to authorize its

search. Where the police reasonably, although incorrectly, believe that a third party has the authority to consent to a search, the search will nevertheless be upheld because the officers' actions in relying on such authority were reasonable. Illinois v. Rodriguez, 497 U.S. ___, ___, 110 S.Ct. 2793, 2800-01, 111 L.Ed.2d 148, 160-61 (1990). See also White v. United States, supra, where woman consenting to search held herself out as defendant's wife and, thus, police reasonably believed she could consent to search.

In United States v. Hamilton, 792 F.2d 837 (9th Cir.1986), a mobile home was parked in the driveway of a house and attached to the house by an electrical cord. Agents asked for and obtained permission from the homeowner to search the mobile home. Actually, the mobile home

belonged not to the homeowner, but to the homeowner's son. The 9th Circuit Court held that the agents could, in good faith, rely on the homeowner's apparent authority to consent to the search of the mobile home.

The Supreme Court in Frazier v. Cupp, 394 U.S. 731, 740, 89 S.Ct. 1420, 1425, 22 L.Ed.2d 684, 694 (1969), refused to engage in "metaphysical subtleties" when a defendant argued that the third party who consented to the search of the defendant's entire duffel bag had actual permission to use only one compartment of the bag. The defendant was found to have "assumed the risk that [the third party] would allow someone else to look inside." Id. The Court's reasoning may be applied to the facts of the instant case. When Gardin consented to a search of her premises, the police were not required to engage in

"metaphysical subtleties" in order to determine whether Gardin enjoyed unlimited access to the unlocked gym bag on the floor of her own living room. Gardin had apparent authority to consent to the search of Owens's bag, and the police acted reasonably when they searched based on her consent.

III. EXPECTATION OF PRIVACY

The majority seems to summarily dismiss the fact that Ms. Gardin may have been given sufficient dominion or control over the bag to be able to consent to a search. If so, her consent is valid regardless of any subjective expectation of privacy Owens may harbor. His expectation may be a factor in determining whether Ms. Gardin had sufficient authority to consent, but it is not controlling. It is acknowledged by the majority that "[a]n expectation of privacy ... is legitimate if

it is one that society is prepared to recognize as reasonable." 322 Md. 616, 626, 589 A.2d 59, 63; Minnesota v. Olson, 495 U.S. ____, ____, 110 S.Ct. 1684, 1687, 109 L.Ed.2d 85, 92 (1990). The majority, however, fails to consider that if the police search was based on a reasonable good faith belief that Ms. Gardin had the authority to consent, the search would be lawful regardless of whether she actually possessed the authority to consent, and regardless of any subjective expectation of privacy Owens may have harbored. See Illinois v. Rodriguez, 497 U.S. at ___, 110 S.Ct. at 2800-01, 111 L.Ed.2d at 159-61. In Rodriguez, the Court said, "what is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been waived, but whether the right to be free of unreasonable searches has been violated." (Emphasis in

original.) Id. at ___, 110 S.Ct. at 2801, 111 L.Ed.2d at 161.

Owens's expectation of privacy is only relevant if Ms. Gardin could not validly consent to a search of Owens's bag or if the police could not reasonably rely on her apparent authority to consent. Even if there was no consent or no apparent authority to consent, I would find that Owens had no reasonable or justifiable expectation of privacy.

There is no question that current law generally provides one with an expectation of privacy in a bag, like the one in the instant case, even if it is unlocked. The police must have a search warrant before they may open it unless the search falls within one of the warrant requirement exceptions (e.g. consent). The expectation of privacy we protect, however, must be reasonable and legitimate. Olson, supra.

Mr. Owens's expectation of privacy should be examined based on the totality of circumstances surrounding his leaving the bag with Ms. Gardin. That totality of circumstances should include such factors as the specific understanding between Owens and Ms. Gardin, the nature of their relationship, the nature of and security of the container, as well as Owens's knowledge about the contents of the bag. His knowledge of both the contents of the bag and the jeopardy in which he was placing Ms. Gardin by leaving the bag in her home are components of the expectation Owens should have about the security and privacy this unlocked bag would enjoy while in the custody of Ms. Gardin. It is not unreasonable to consider the contents in determining one's expectation of privacy in a container. For example, if one leaves a large box containing a dead body in the

home of a friend, after the passage of time one should have no expectation of privacy in the contents, since a corpse may become quite malodorous and one should anticipate that the package may be opened to see what is causing the fetid aroma. In the instant case, the trial judge could properly have assumed Owens was aware of the contents of the bag he left in Ms. Gardin's exclusive custody and control. In this limited situation, it is Owens's action in depositing contraband, the possession of which is unlawful, with Ms. Gardin that placed her at risk of police scrutiny and possible arrest. Fundamental fairness requires that, if Owens placed Ms. Gardin at risk of being arrested for possession of the bag, she should be entitled to exonerate herself by assisting the police and authorizing a search of the bag. Society should expect, and Owens should

expect, that if the police come to Ms. Gardin's home and express their suspicion that someone may have left drugs in her home, she would say, "Please look and see, and if someone has left drugs in my home take those drugs away." There is no good reason to elevate the privacy right of one who leaves an unlocked bag containing drugs in the home of a friend over the right of the friend to insure that his or her home is drug free. I believe society is not prepared to accept that Owens had a legitimate and reasonable expectation of privacy when he left his bag of drugs in the home of a casual friend.

In United States v. Botsch, 364 F.2d 542 (2d Cir. 1966), cert. denied, 386 U.S. 937, 87 S.Ct. 959, 17 L.Ed.2d 810 (1967), it was found that the custodian of a defendant's property may consent to a search to prove that he is not involved in

illegal activity. "It would be a harsh doctrine, indeed, that would prevent an innocent pawn from removing the taint of suspicion which had been cast upon him by a defendant's cunning scheme." Id. at 548. Botsch was ordering merchandise and having it sent through the mail to a shack that he had rented from Stein. Unbeknownst to Stein, the merchandise was obtained by fraud. Botsch asked Stein to place the items inside the shack when they arrived, told him to use his key to open the door, and gave him money to pay the delivery charges. When the authorities told Stein of the suspected scheme, he gave them access to the shack. The court reasoned that "[b]ecause Stein's activities--though innocent--were inextricably intertwined with Botsch's alleged scheme and cast suspicion upon him, we believe his authorization of the inspection when viewed

in its full context rendered the search reasonable." Id. at 548. An inculpable party who was simply "left holding the bag" should be able to consent to a seizure and/or search in order to clear his or her name. See also United States v. Gargiso, 456 F.2d 584, 587 (2d Cir.1972) (landlord who, along with all tenants in building, had access to basement area could allow a search for stolen goods in an effort to exculpate himself); United States v. Jones, 430 F.Supp. 219, 225 (W.D.Penn.1977), aff'd, 591 F.2d 1337 (3d Cir.1979) ("[p]ersons who are unwittingly thrust into the role of a participant in criminal activity may consent to a search of items which have been placed in their safekeeping in order to exculpate themselves from the alleged crime").

Had Owens locked his bag, he would have had a greater expectation of

privacy. When a container is locked, some courts have held that the host may consent to the seizure of the guest's property, but the police, barring exigent circumstances, must obtain a warrant before opening the locked item and conducting an investigatory search. United States v. Diggs, 569 F.2d 1264, 1265 (3d Cir.1977) ("a gratuitous bailee of a locked box possibly containing contraband had a sufficient property interest in the box to surrender it to the authorities"); see also United States v. Potamitis, 564 F.Supp. 1484, 1488 (S.D.N.Y.1983), aff'd, 739 F.2d 784 (2d Cir.), cert. denied, 469 U.S. 934, 105 S.Ct. 332, 83 L.Ed.2d 269, cert. denied sub nom., 469 U.S. 918, 105 S.Ct. 297, 83 L.Ed.2d 232 (1984) (third party delivered locked footlocker to FBI, who then obtained a search warrant and opened the locker; "a person who has been duped into holding

stolen property has the right promptly to establish his innocent role in the transaction and to exculpate himself by voluntarily delivering the contraband to the authorities"). In Gieffels v. State, 590 P.2d 55 (Alaska 1979), a gratuitous bailee permitted the police to seize the defendant's suitcase. The court did not have to determine whether the police could also search the suitcase, since the search was conducted pursuant to a search warrant, but the court stated that the bailee's "right to exculpate himself and to avoid any possible involvement in the crime charged outweighed Gieffels' right to have the privacy of his property protected." Id. at 62.

People who come to suspect the presence of drugs in their homes should be expected to and have the right to enlist police assistance in ensuring that their

premises are drug free. This right should transcend any expectations of privacy by someone who exposes a friend to criminal liability by leaving an unlocked bag of drugs in the home of that friend.

I would affirm the conviction. Judge RODOWSKY and SMITH have authorized me to state that they concur with the views expressed herein.

APPENDIX B

LENARD BERNARD OWENS

v.

STATE OF MARYLAND.

No. 1563, Sept. Term, 1989.

Court of Special Appeals of Maryland.

June 6, 1990.

Submitted before WILNER, KARWACKI and CATHELL, JJ.

CATHELL, Judge.

Appellant, Lenard Bernard Owens, was convicted before a jury in the Circuit Court for Washington County (J. Corderman presiding), for possession of cocaine with

intent to distribute. He was sentenced to 20 years imprisonment and a $10,000 fine. On appeal he presents a single issue:

> Did the court below err in holding that Appellant had neither standing to contest a search of, nor a reasonable expectation of privacy in, a piece of luggage he placed in a friend's living room, temporarily?[1]

The Facts

Appellant traveled, in late January and early February 1988, from his home in Florida to the Hagerstown area. He apparently first delivered the bag in question to "Miss Elizabeth's" house. It was not with him on the last day of January 1988 when he spent the evening at Marla Gardin's house. According to Owens, at some point he asked Marla Gardin to take the bag in question from Miss Elizabeth's

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[1] The hearing judge was Judge D. Moylan.

house to her house, which she did,[2] where it was placed in the living room. There it remained until the consensual search occurred.

Prior to trial, Judge D. Moylan held a suppression hearing in respect to the search. The relevant testimony of Marla Gardin at that hearing was as follows:

> Q. Okay, and when he [Detective Sheppard] came, what, if anything, did he say to you?
>
> A. He asked me if he could search my house and I told him yes.
>
> * * * * * *
>
> Q. Did he show you a form, read a form to you about a Right to Consent?
>
> A. Yeah.
>
> * * * * * *

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[2] Gardin did not admit to having transported to her home the bag in question.

Q. Did the officers ask you for permission to search those bags in particular?

A. Yes, they did.

Q. And what did you tell them?

A. They could.

* * * * * *

A. One was searching bags and one was searching the house. It was all at the same time.

Detective Sheppard testified that:

A. I indicated to her that I had received information that there were drugs in her apartment that was brought there by four subjects who just arrived there that morning.

Q. And what, if anything, was her response?

A. She stated that she had no problems with us coming in and searching the house.

* * * * * *

Q. And Detective, what, if anything, did she indicate to you about the persons arriving that day?

A. After she signed the consent form, she pointed to some luggage which was located on the southwest corner of the living room and she stated "they had just brought it here this morning and if there's any drugs it would be in there." . . .

* * * * * *

Q. And as a result of the consent, did you then search those suitcases?

A. Yes.

* * * * * *

Q. Do you recall anything she said about [the] intentions [of those leaving the bags]?

A. Basically the only thing was that she told me that they had come to the apartment that morning and uh, after they had just arrived from Florida, and her response also was that they would come to her apartment when they would come to town to sell crack, oftentimes leaving some in her apartment, but oftentimes taking it out on the street with them.

Owens' relevant testimony was as follows:

Q. Where was your luggage at that time?

A. It was at Marla's house.

Q. What were your intentions in regard to that luggage?

A. Well, it doesn't really matter because I had two bags and I just wanted to get a[n] outfit to put on because I had that outfit on for a couple of days and I left.

Q. Were you going to go back to pick it up?

A. Well, later on whenever I had time to.

Q. What did you tell Marla about it?

A. I asked her could I leave my luggage there till I come back and she said yes.

* * * * * *

Q. Okay. Do you know how your luggage got from Miss Elizabeth's house to Marla Gardin's?

A. Yes.

Q. How?

A. Marla brought it over.

Q. At whose request?

A. I asked her to bring it over to where I could change clothes.[3]

* * * * * *

Q. You said you had left and gone somewhere and at some point down the road you were going to come back and get the bag?

A. Yes.

Q. But you weren't sure when you were going to come back?

A. No.

The Law

In cases of third-party consent, what is involved is the lack of a total expectation of privacy, the lack of absolute Fourth Amendment coverage, in the party against whom the consent ultimately operates vis-a-vis the spouse, cotenant, or co-owner giving the consent. Some writers have referred to this situation as "an assumption of risk" on the part of each party sharing control with another party. There is always

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[3] Appellant apparently failed to inform Gardin that the bag he was asking her to transport contained 973 pieces of crack cocaine valued at $97,000 plus a substantial sum of cash.

> the risk that the other person enjoying equal privileges in the protected area may invite guests, even including policemen, into the private zone. What is involved is the lack of full Fourth Amendment coverage as against the spouse or co-owner and his or her guests.

Gilbert & Moylan, Maryland Criminal Law 407-08, § 35.

While we have reviewed the authorities cited by both parties, we believe that the specific factual circumstances of this case bring it within the following line of cases, wherein consent searches generally, and third-party consent searches specifically, have been upheld as reasonable searches.

The tenant's adult daughter, Mrs. Graff, consented to a search of a bedroom she shared with the defendant in the search at issue in U.S. v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Evidence was recovered from a diaper bag

examined during the search. The lower court held that the search was unlawful because the Government had failed to show Mrs. Graff's actual authority to consent to a search of premises jointly occupied with the defendant. While ultimately remanding to the District Court, the Supreme Court stated, 94 S.Ct. at 993, that:

> More generally, in Schneckloth v. Bustamonte, 412 U.S. [218], at 245-246, 93 S.Ct. [2041], at 2057 [36 L.Ed.2d 854 (1973)], we noted that our prior recognition of the constitutional validity of "third party consent" searches in cases like Frazier [v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969)] and Coolidge v. New Hampshire, 403 U.S. 443, 487-490, 91 S.Ct. 2022, 2048, 29 L.Ed.2d 564 (1971), supported the view that a consent search is fundamentally different in nature from the waiver of a trial right. These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed

> common authority over or other sufficient relationship to the premises or effects sought to be inspected. [emphasis added]

Concluding, 94 S.Ct. at 996, it held:

> It appears to us, given the admissibility of Mrs. Graff's and respondent's out-of-court statements, that the Government sustained its burden of proving by the preponderance of the evidence that Mrs. Graff's voluntary consent to search the east bedroom was legally sufficient to warrant admitting into evidence the $4,995 found in the diaper bag.

More recently the Supreme Court has spoken in respect to the expectation of privacy[4] when a person places items under

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[4] Preliminarily, we note that the Supreme Court disfavored the use of the term "standing," as it relates to Fourth Amendment search and seizure issues. That Court favored the use of the terminology, in the Fourth Amendment arena, of "reasonable expectation of privacy," which does not carry with it "the 'arcane' concepts of property law" sometimes associated with "standing." Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). The use of the term "standing," Cont'd

the control of a third party whose effects are then seized. The defendant in Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980), was present when police arrived at a residence to serve an arrest warrant for another individual. There he remained while police left to get a warrant to search the house.[5] Rawlings had flown to Bowling Green a week before his arrest, met Cox and had spent a couple of nights at Cox's house. On the morning of the search, Rawlings placed his drugs in Cox's purse after allegedly securing her permission.

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however, is still firmly embedded in modern legal culture, although its meaning in Fourth Amendment cases has evolved to conform to the dictates of the Supreme Court.

[5] Only those who consented to be searched were permitted to leave, since the police had discovered quantities of narcotics during the arrest.

The Supreme Court stated at 100 S.Ct. 2561-62:

> In holding that petitioner could not challenge the legality of the search of Cox's purse, the Supreme Court of Kentucky looked primarily to our then recent decision in Rakas v. Illinois, supra, where we abandoned a separate inquiry into a defendant's "standing" to contest an allegedly illegal search in favor of an inquiry that focused directly on the substance of the defendant's claim that he or she possessed a "legitimate expectation of privacy" in the area searched. See Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In the present case, the Supreme Court of Kentucky looked to the "totality of the circumstances," including petitioner's own admission at the suppression hearing that he did not believe that Cox's purse would be free from governmental intrusion, and held that petitioner "[had] not made a sufficient showing that his legitimate or reasonable expectations of privacy were violated" by the search of the purse. [Rawlings v. Kentucky] 581 S.W.2d [348], at 350 [1979].
>
> We believe that the record in this case supports that conclusion. Petitioner, of

course, bears the burden of proving not only that the search of Cox's purse was illegal, but also that he had a legitimate expectation of privacy in that purse.[6] See Rakas v. Illinois, supra, 439 U.S., at 131, n. 1, 99 S.Ct., at 423, n. 1; Simmons v. United States, 390 U.S. 377, 389-390, 88 S.Ct. 967, 973-974, 19 L.Ed.2d 1247 (1968)....

Petitioner contends nevertheless that, because he claimed ownership of the drugs in Cox's purse, he should be entitled to challenge the search regardless of his expectation of privacy. We disagree. While petitioner's ownership of the drugs is undoubtedly one fact to be considered in this case, Rakas emphatically rejected the notion that "arcane" concepts of property law ought to control the ability to claim the protections of the Fourth Amendment. See 439 U.S., at 149-150, n. 17, 99 S.Ct., at 434, n. 17. See also United States v. Salvucci, 448 U.S., [83], at 91-92, 100 S.Ct. [2547], at 2552-2553 [65 L.Ed.2d 619 (1980)]. Had petitioner placed his drugs in plain view, he would still have owned them, but he could not claim any legitimate

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6 The search in Rawlings was pursuant to a warrant.

> expectation of privacy. Prior to Rakas, petitioner might have been given "standing" in such a case to challenge a "search" that netted those drugs but probably would have lost his claim on the merits. After Rakas, the two inquiries merge into one: whether governmental officials violated any legitimate expectation of privacy held by petitioner. [emphasis added]

Sartain v. United States, 303 F.2d 859 (9th Cir.), cert. denied, 371 U.S. 894, 83 S.Ct. 194, 9 L.Ed.2d 127 (1962), was a Fourth Circuit case in which the defendant left a locked brief case and the key which unlocked it in a friend's kitchen cabinet. When that friend learned of appellant's arrest, she called a Mr. Zucher, who advised her to take it to a lawyer. She did so, and the lawyer then turned the briefcase over to the police. The key was missing. The police, aware that it was Sartain's briefcase, then broke

into the briefcase, discovering heroin inside. The Court stated 303 F.2d at 862:

> The thrust of appellant's argument on this point is that it was unreasonable for the officers, without a warrant, to open the briefcase and seize the narcotics upon the invitation of those who were then in control of the bag, and after appellant was in custody on a related charge. In considering this point, we adhere to the approach outlined in United States v. Rabinowitz, 339 U.S. 56, 66, 70 S.Ct. 430, 435, 94 L.Ed. 653 (1950):
>
> > "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search is reasonable. That criterion in turn depends upon the facts and circumstances--the total atmosphere of the case. It is a sufficient precaution that law officers must justify their conduct before courts which have always been, and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment."
>
> See also, Harris v. United States, 331 U.S. 145, 150, 67 S.Ct. 1098, 1101, 91 L.Ed. 1399 (1947): "'Each

> case is to be decided on its own facts and circumstances.'"
>
> Here, we have a situation where a defendant delivers his briefcase and the means of access to it to another, thereby voluntarily surrendering to a large degree his right of privacy. Upon defendant's being arrested and charged on a closely related offense, the person then in control of the bag forwards it through intermediaries to the police. The police, with probable cause for a search, and with reason to believe that control of the bag had been surrendered to the persons who turned it in, conduct a search. The search turns up, not general evidentiary materials, but objects subject to immediate forfeiture and seizure-the very instrumentations of the crime. We cannot say of this activity, as was said in Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955), that it was unreasonable under the circumstances....

Several of our decisions also appear relevant to the Fourth Amendment issue in the case at bar. These include: Tate and Hall v. State, 32 Md. App. 613, 363 A.2d 622 (1976), where the search of a minor

defendant's bedroom was upon the consent of his mother, the owner of the house. Incriminating evidence was seized from that room.[7] We said at 619-20, 363 A.2d 622:

> This issue of third party consent was addressed under strikingly similar circumstances by this Court in Jones v. State, 13 Md. App. 309, 283 A.2d 184 (1971), cert. denied, 264 Md. 749 (1972). In that case the mother of a 20-year-old defendant gave permission for a search of his bedroom. There, as here, the mother testified that her son's bedroom was his alone, but that he paid no rent. The Court found as dispositive, in upholding the validity of the search, the fact that:

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[7] The minor son was Tate. In referring to the other defendant, Hall, we said in a footnote:

> We note a probable lack of standing in the case of appellant Hall to raise this issue since it nowhere appears that he had any interest in the premises subjected to the search. [citations omitted]

Id. [32 Md. App.] at 618, n. 1, 363 A.2d 622. We likewise note that Owens had no interest in the premises being searched in the instant case.

> "Appellant's mother had the sole control, power and superior right to exclude others, including the appellant, from her home, and also from the very bedroom that the appellant used. It was her free and voluntary choice to allow the police to search her house." Id., 13 Md. App. at 315 [283 A.2d 184] (citations omitted).
>
> While it is true that in Jones the defendant was present and offered no objection when consent for the search was given, we do not consider that fact significant. What is crucial and dispositive, in our view, is that Harper possessed not only a common authority with Tate over the searched premises, but in fact possessed superior authority under these circumstances, including the right to exclude him from the premises.

It is equally clear in the case at bar that Gardin had "sole control, power and superior right to exclude others, including the appellant, from her home ...."

McDonald v. State, 61 Md. App. 461, 487 A.2d 306 (1985), involved a situation

where an adult daughter of the owner of the house gave consent to the police for them to search the bedroom shared by the mother and the defendant. A motion to suppress was denied. On appeal, we said:

> Premises may be searched without a warrant when voluntary consent to search the premises is given. U.S. v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). The prosecution is not limited to proof that the consent was given by the defendant. The search will be deemed valid if voluntary consent is obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected....

Id. at 470, 487 A.2d 306 (emphasis added).

After consenting to a search of her apartment, Gardin directed the searching officers to the bags saying, "They had just brought it here this morning and if there's any drugs it would be in there...." The Court of Appeals in the recent case of Doering v. State, 313 Md. 384, 545 A.2d

1281 (1988), was concerned with multiple issues including the issue of a consensual search of a school bus that had been modified as living quarters. When Doering and his busmate, Reinhardt, were asked if anybody remained on the bus, Doering remained silent but "Reinhardt answered that there was no one else, and said 'go check for yourselves,' or words to that effect." Doering, at 401, 545 A.2d 1281. The officers entered the bus and removed weapons, some of which were apparently introduced at the trial. The Court stated at 394, 545 A.2d 1281:

> The concept of a reasonable expectation of privacy in a particular place is not simplistically singular. It involves, instead, a bundle of privacy interests. One who closes the door to a glass telephone booth may have a reasonable expectation of privacy as to what he is about to say, but no reasonable expectation that the number he dials may not be seen by a casual observer outside the

> booth. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Similarly, one may have a legitimate expectation that police officers will not conduct a warrantless intrusive search of the curtilage to his home, but have no reasonable expectation that police officers will not simply enter a portion of that curtilage in the course of an investigation. Doering enjoyed no constitutionally reasonable expectation that police officers would be excluded from the place where they confronted him.

The Court, in discussing warrantless searches, discussed the issue or intrusions saying at 397, 545 A.2d 1281: "In assessing the gravity of an intrusion, we consider the objective expectation of privacy that reasonably existed, and the extent to which it was invaded." (emphasis added) It concluded its discussion on the consent issue at 402, saying:

> We think a most important consideration is the fact that the consent was volunteered, and was not given in response to a request by the police. It is difficult to conceive of the consent merely

> being an acquiescence to the commanding presence of the police when the idea for the search originated with the persons being detained.

While it is clear in the case at bar that the idea for the search originated with the police, it is equally clear that the idea that the drugs were in the bags originated with the tenant who expressly directed the officers to the bags. Owens had no legitimate expectation of privacy in Gardin's apartment. Owens surrendered substantial control of the bag when he had Gardin transport it to premises over which he had no control. He likewise had no reasonable expectation that Gardin, if confronted by accusations that drugs had just been delivered to her, would not attempt to exculpate herself by directing the officers to the unlocked bags she had delivered to her own house at appellant's request.

Gardin possessed the bag in the capacity of a gratuitous bailee. There was no evidence that she had received any instructions not to open the bags, nor did she violate any other instructions given to her by Owens when she consented to the search of the bag. According to the testimony, at the time the officers obtained Gardin's consent, the facts available to the officers supported a theory that the bags had been delivered to the tenant. The police could have inferred, based upon the tenant's response, that she was the ultimate deliveree of the bags and that she in fact possessed whatever drugs were contained therein. Thus, the tenant had an apparent possessory interest in the bags, a real interest in the premises, and apparent authority to consent to the search of the bags. We believe she therefore had a sufficient

relationship to the bag in question to consent to the search.

The facts in the case at bar are similar to those in Thompson v. State, 62 Md. App. 190, 488 A.2d 995 (1985), which involved the search of a briefcase found in a hotel room which the police were searching pursuant to a warrant. The search was being conducted for the purpose of discovering controlled dangerous substances. Unlike the instant case, however, the officers had no reason to believe that the briefcase belonged to the defendant.

We held that Thompson had Fourth Amendment standing to litigate the search and seizure issue. We said at 200-01, 488 A.2d 995:

> We agree with the appellant as to his standing to challenge the search of the briefcase. When the officers were initially searching the motel room, they

were searching both the room at large and all containers within it for "controlled and dangerous substances and the items used in their manufacture, distribution and use." Without suggesting that it would have made any difference, we note that the officers had no reason to believe that the briefcase under the bed was the special property of the appellant, as distinguished from any other closet, drawer, box, suitcase, or purse examined in the course of the larger search. The reasonableness of the police behavior has nothing, however, to do with standing to object. The reasonableness of police conduct, assessed from their subjective point of view in light of the facts available to them at the time of the search, bears only upon the merits of Fourth Amendment satisfaction. Standing to object, on the other hand, is assessed objectively in terms of the actual, historic facts that are developed at the time of the suppression hearing itself. [emphasis added]

At the suppression hearing, it was developed that the appellant's photograph and identification papers were in the briefcase. We conclude that this was enough to entitle him to standing to litigate the constitutional propriety of the

> search of that briefcase. Standing to object, however, by no means suggests that the appellant will win upon the Fourth Amendment merits; it simply entitles him to litigate the Fourth Amendment merits.

We concluded, at 218, 488 A.2d 995:

> What emerges is that the police in this case were conducting a reasonable and constitutional search of the motel room for evidence of narcotics and narcotics paraphernalia. That authorized them to search any closet, drawer, box, suitcase, or other container-including the appellant's briefcase-that might have been used to store or conceal such contraband. The appellant had standing to litigate the search of his briefcase; the appellant loses on the merits of that litigation.

Likewise, the police in the case sub judice were conducting a reasonable search of the premises, since they had the tenant's consent.

The facts in Bratt v. State, 62 Md. App. 535, 490 A.2d 728, cert. denied, 304 Md. 95, 497 A.2d 818 (1985), indicated that while conducting a consent search the police learned that several containers had been left by a prior tenant (the defendant). They discovered evidence in the containers.

We stated, at 540, 490 A.2d 728:

> Appellant contends that the warrantless search of the cardboard boxes cannot be justified under the theory of abandonment or consent. We disagree. Diehl had exclusive control over the premises that she rented from Lohr. Under these circumstances, she had full authority to consent to the search of the entire premises.
>
> * * * * * *
>
> We hold that Diehl's control over the entire premises warranted her consent to search unsealed boxes in the open basement.

The Pennsylvania case of Com. v. Latshaw, 481 Pa. 298, 392 A.2d 1301, cert.

denied, 441 U.S. 931, 99 S.Ct. 2050, 60 L.Ed.2d 659 (1979), involved a factual situation where Mr. Hinds, a relative of the owner of a barn, who had permission to store items therein, then subsequently gave permission for Latshaw to store drugs and containers in the barn. The owner subsequently consented and/or requested that the police examine the contents of the containers. Judge Roberts, in a dissent, clearly framed the issue, saying:

> The majority justifies today's exception from the well-settled warrant requirement of both the federal and Pennsylvania Constitutions on the theory that Minnie Bubb, owner of the barn in which the closed boxes and footlockers were found, but not the owner of these storage containers, could "consent" to the officers' opening the containers.

Id. 392 A.2d at 1307. The key factual distinction between Latshaw and the case at bar was that the owner in Latshaw did not know the containers were in her barn,

whereas in the instant case, the person in control of the premises was the one that placed the container in the premises searched.

The Latshaw majority discussed the law:

> The Fourth Amendment does not preclude a warrantless search of property when consent is given by a person possessing the authority to consent to such search.
>
> * * * * * *
>
> Mr. Hinds' [an accomplice of Latshaw] use of the barn ... was gratuitous and not pursuant to any type of lease arrangement.
>
> * * * * * *
>
> In any event the third party consent exception to the warrant requirement is firmly established. South Dakota v. Opperman, supra [428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976)]; U.S. v. Matlock, supra; Schneckloth v. Bustamonte, supra; Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). The basis for the principle that the consent of one who possesses common authority over premises or effects is valid

> as against the absent, non-consenting person with whom that authority is shared, is discussed at length in United States v. Matlock, supra. In Matlock, the Court focused upon the joint access or control, "so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others assume the risk that one of their number might permit the common area to be searched." Id. 415 U.S. at 171, n. 7, 94 S.Ct. at 993.
>
> A close reading of the above quoted language from Matlock indicates that the test is not based merely on appellant's subjective expectation of privacy, but rests also on a finding that said expectation was reasonable. In determining what is "reasonable" all the surrounding facts and circumstances must be considered. [footnote omitted]

Id. 392 A.2d at 1304-05.

As we perceive it, the appellant relinquished control over his bag to Ms. Gardin. Gardin, according to appellant's testimony, then transported the bag to her house, over which she had sole control. Not only did she have the right to deny

entry to the officers, she had the right to deny entry to Owens. Mr. Owens had no specific plans to recover the bag within a reasonable time and the record reflects that he never made any effort to recover or make any inquiry in respect to the bag. He did not inform Gardin of any specific plans in regard to the bag other than to tell her to take it to her house.

We believe that Gardin's control over the bag was sufficient for her to consent, in the manner that she did, when confronted by police that they "had information that the drugs had been brought to her house by men from Florida." At this point, Gardin, at the least, had been advised that she and/or her apartment were suspected of being involved with drugs. Not only was she the actual person who had transported the bag to her apartment, it was in an area under her exclusive control. She was under

no direction not to open the bags. She may well have also believed that it was necessary for her to consent in order to exculpate herself as a suspect. This motivation, together with the fact that she delivered the bag to the premises, had sole control of the premises, had no instructions from the defendant as to how to maintain control over the bags or even as to when he would return, constituted a circumstantial, factual totality sufficient for the trial court to hold that Owens had an insufficient expectation of privacy in the bag, and that under that totality, the search was not unreasonable, and thus was not in violation of the Fourth Amendment.

We hold that a third-party gratuitous bailee of a container may give valid consent to police to search that container where the bailee has exclusive physical control over the item, where the bailee is

in a position to deny the owner of the item physical access to it, and where the bailee is in an inculpatory position as a result of the bailment. Under these circumstances, the owner of the item has relinquished control over the item to a sufficient degree to undermine his or her expectation of privacy in the item. With the expectation of privacy eroded, the owner has no valid Fourth Amendment search and seizure complaint regarding the legality of the search of the item.

Were we to hold otherwise, sophisticated couriers of contraband might soon avail themselves of the following scenario as a means of avoiding prosecution for these offenses: The courier engages a third-party to take control of the contraband. The third-party, if accosted, then consents to a search in order to exculpate himself or herself, but denies

ownership of the item. The true owner of the item then has the evidence suppressed, based upon a violation of his or her own expectation of privacy.

We hold that under the total atmosphere of this case, whatever subjective expectation of privacy appellant retained in the bag was objectively unreasonable. Accordingly, we affirm.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

APPENDIX C

IN THE CIRCUIT COURT FOR
WASHINGTON COUNTY, MARYLAND

Criminal Trials No. 10050

STATE OF MARYLAND,

vs.

LENARD BERNARD OWENS,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Courtroom No. 3
Hagerstown, Maryland

February 7, 1989

BEFORE:

HONORABLE DANIEL W. MOYLAN,
Associate Judge

APPEARANCES:

For the State:
CHARLES P. STRONG, JR., ESQ.

For the Defendant:
WILEY RUTLEDGE, ESQ.

[45] COURT'S RULING

THE COURT: I'm prepared to rule in part and I'm going to look at the cases in part.

The apartment was rented by Marla Gardin and she paid $37.00 a month for the apartment in which she and her two-year-old daughter lived. The evidence quite clearly shows that no one else has any proprietary interest in that place, and in view of her daughter's age at two, being below the age to give any meaningful consent in respect to the issues that we're talking about, I would find that Marla Gardin had the exclusive and sole right in that apartment respecting the Fourth Amendment Rights.

I find that she gave her permission to Officers Sheppard and Litton to search the premises located at 53 Murph [46] Avenue in Hagerstown, Maryland.

I find that the consent was valid, that it was quite evident that she was advised that she had a constitutional right not to have her premises and property, which was either owned by her or under her care, custody or control, searched without a search warrant, and knowing of her lawful right to refuse to consent to such a search, she gave permission to the aforenamed officers to conduct a complete search of her premises and the property located thereon, including all buildings or vehicles both inside and outside; and she further consented and gave permission to take from her premises any property that they would desire as evidence for criminal prosecution.

It is clear to me that there was no coercion, that the consent that she gave was intelligently and knowingly given, and that the consent was valid.

As to the narrow issue presented by this case, I'm going to look at these cases and then we'll reconvene in twenty minutes and I'll rule on that issue.

(Whereupon at 3:10 P.M. a recess was taken. At 3:40 P.M. court was reconvened and the following ensued in open court):

THE COURT: I read the cases that you cited to me, Thompson v. State, 62 Md. Appeals, and I also read three Supreme Court cases: Rakus v. Illinois - which, if you'll forgive me, I use the Supreme Court Reporter and I'll give you [47] that citation and maybe you can work back to that other one that you refer to - 99 S. Ct. 421, and Rollins v. Kentucky, 100 S. Ct. Rep. p. 2556, and also in that same volume, U. S. v. Payner, 100 S. Ct. Rep. 2439.

Do you want the U. S. citation on that?

MR. RUTLEDGE: That's okay, Your Honor, I can find it.

THE COURT: Basically the Fourth Amendment is a personal right and when the defendant chooses to leave his suitcase in Miss Gardin's apartment - I searched my mind to try to think of a legal theory that would cover this situation and I couldn't think of one until, in one of these cases, I was reading and it referred to a bailment, and here, as best as I could call this thing, we'd call it a gratituous bailment, and the fact that these defendants, who apparently come up here from Florida and flop their suitcases down in Miss Gardin's apartment without any arrangement whatsoever, they have no interest in that apartment, no proprietary interest whatsoever, and they flop their suitcases in there and then just go off, intending to return hours or days later,

does not give them any Fourth Amendment right to challenge the search of her apartment. She is the person and the sole and exclusive person who could grant consent to search that apartment under the evidence presented.

The fact that to say that Mr. Owens can plop a suitcase down there or, if you want to be more precise, if he [48] even creates a gratuitous bailment or, in its best light, if there is a gratuitous bailment, that he can therefore vest himself with some Fourth Amendment Right by doing that, it just makes no sense at all and it goes beyond any Supreme Court right of privacy.

For example, you can argue that's his suitcase. Okay, fine. The contents in it are his. Fine. Suppose instead of having the suitcase - I don't think it was a suitcase, it was some sort of bag or

something with a zipper on it - suppose instead of having it zipped he had it unzipped and suppose he had the drugs - I don't have my notes here but I was flabbergasted by the amount of drugs that he had in that suitcase - but suppose he had the drugs right where you could see them, there certainly, obviously, would not be any reasonable expectation of privacy that he could have under those circumstances. Suppose he didn't have them in plain view but he had them closed and he left them out on the sidewalk or left them on a corner on Jonathan Street where maybe some of the street pushers sell their drugs, there wouldn't be Fourth Amendment right of privacy. The Fourth Amendment and legitimate expectation of privacy was in the area searched and the person who had a reasonable expectation of privacy was Miss Gardin but not this defendant.

I'm particularly struck by the language in Rollins v. Kentucky at page 2561 of that opinion, and here the [49] defendant doesn't even claim a legitimate expectation of privacy in the area searched. The area searched was Miss Gardin's apartment. Here there was an illegal search, in the Supreme Court case, of this woman's purse and because the defendant had his property in the purse, he objected, saying that it should be free from governmental intrusion and the reason why he could not raise the objection is because there was no showing that he had a legitimate or reasonable expectation of privacy.

In short, I don't see where this defendant has shown that he had a legitimate or reasonable expectation of privacy in the area that was searched here, which was Miss Gardin's apartment. When

she gave permission to search, she didn't give permission to search part of her apartment, she gave permission to search the whole apartment and they had the right to search. They could look in bureau drawers, they could lift the mattress and look under the mattress; they could look under the beds; they could look in containers. If there were ten containers there, they didn't have permission to search seven containers but not these three.

It would be a fine how-do-you-do if you could simply stick a label on a suitcase and create an expectation of privacy. Then all the person would have to do would be to stick someone else's name on the container where they kept anything that was illegal and the police couldn't enter or look [50] in that container because it would appear to the police that somebody

else had a proprietary interest in it. I think that is a very tortured interpretation that you try to invest some reasonable legitimate expectation of privacy in that suitcase the way this person handled it in this case.

I would rule against him on both the issue of standing and also on the merits. I have considered it both ways and I don't find that he has any standing to object; but even assuming that I am in error and for purposes of decision only, I have gone ahead and assumed that he had standing, even though I specifically find that he does not, and even assuming that he has standing on the merits, I come up with the same conclusion. No personal Fourth Amendment right of his was violated when the police have the consent to search her apartment and everything therein.

So I'm going to deny the Motion for Suppression of Evidence and the case then can proceed to trial.

* * *

[Certificate of Court Reporter omitted in printing]

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RESPONSE REQUESTED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-153

STATE OF MARYLAND,

Petitioner

v.

LENARD BERNARD OWENS,

Respondent

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Lenard Bernard Owens, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached Brief in Opposition to the State of Maryland's Petition for Writ of Certiorari to the Court of Appeals of Maryland without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

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The Respondent's Affidavit in support of this Motion is attached hereto.

Bradford C. Peabody

Bradford C. Peabody
Assistant Public Defender
Appellate Division
201 Saint Paul Place
Baltimore, Maryland 21202
(301) 333-4829

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 23RD day of October, 1991, a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari was delivered to Gary E. Bair, Assistant Attorney General, 200 Saint Paul Place, Baltimore, Maryland 21202.

Bradford C. Peabody

Bradford C. Peabody
Assistant Public Defender

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NO.

STATE OF MARYLAND,

Petitioner

v.

LENARD BERNARD OWENS,

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Lenard Bernard Owens, being duly sworn, depose and say that I am the Respondent in the above entitled case, that I am unable to pay the costs of said proceeding, and that I believe I am entitled to proceed in forma pauperis.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

N/O

(a) If the answer is *yes*, state the amount of your salary or wages per month and give the name and address of your employer.

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

NOV 1987 $800 month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment or in the form of rent payments, interest, dividends, or other source?

NO

(a) If the answer is *yes*, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or saving accounts? NO

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

NO

(a) If the answer is *yes*, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Lenard B Owens
Lenard Bernard Owens

Subscribed and sworn to before me, a Notary Public this 11th day of June, 1991.

Cathy A Wisherd
NOTARY PUBLIC

My Commission Expires: 7-1-95

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefore.

_____
JUSTICE

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-153

STATE OF MARYLAND,

Petitioner

v.

LENARD BERNARD OWENS,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Stephen E. Harris
Public Defender

Bradford C. Peabody*
Assistant Public Defender

Office of the Public Defender
Appellate Division
201 Saint Paul Place
Baltimore, Maryland 21202
(301) 333-4829

Counsel for Respondent

*Counsel of Record

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INDEX

TABLE OF CONTENTS

Page

QUESION PRESENTED iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

CONCLUSION 11

TABLE OF CITATIONS

Cases

Arkansas v. Sanders, 442 U.S. 753 (1979) 4, 5

California v. Acevedo, U.S. , 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) 3, 4

Commonwealth v. Silo, 389 A.2d 62 (1978) 7

Connecticut v. Mooney, 558 A.2d 145 (Conn. 1991) 5

Corngold v. United States, 367 F.2d 1 (9th Cir. 1966) 7, 9

Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) 6

In re Scott K., 595 P.2d 105 (Cal. 1979) 6, 9

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) 11

Matter of B.K.C., 413 A.2d 894 (D.C. Cir. 1980) 9

Minnesota v. Olson, 495 U.S. , 109 L.Ed.2d 85 (1990) 10

Owens v. State, 83 Md. App. 353, 370, 574 A.2d 362 (1990) 2, 8, 11

Owens v. State, 322 Md. 616, 589 A.2d 59 (1991) 3, 4

Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) 10, 11

State v. Cooke, 282 S.E.2d 800, (N.C.App. 1981), *aff'd* 291 S.E.2d 618 (N.C.1982) 9, 11

State v. Evans, 372 P.2d 365 (Ha. 1962) 6

State v. Pinegar, 583 S.W.2d 217 (Mo. App. 1979) 6, 11

Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964) 6, 7

Thompson v. State, 62 Md. App. 190, 488 A.2d 995 (1985) 10

United States v. Block, 590 F.2d 535 (4th Cir. 1978) 5, 7

United States v. Chadwick, 433 U.S. 1 (1977) 5

United States v. Fernandez, 772 F.2d 495 (9th Cir. 1985) 7, 8, 11

United States v. Impink, 728 F.2d 1228 (9th Cir. 1984) 6

United States v. Piet, 498 F.2d 178 (7th Cir. 1974) 7

United States v. Prescott, 480 F.Supp. 554, (W.D.Pa. 1979) 9

United States v. Wilson, 536 F.2d 883 (9th Cir. 1976) 8, 9

Miscellaneous

Wayne R. LaFave, *Search and Seizure* (1987 ed.) 5, 7, 9

QUESTION PRESENTED

Has the Fourth Amendment been violated where the police, relying solely on the consent of the resident of an apartment, search closed luggage which the police believe belongs to a traveler who just arrived with contraband?

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-153

STATE OF MARYLAND,

Petitioner

v.

LENARD BERNARD OWENS,

Respondent

BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

The Respondent, Leonard Bernard Owens, by his attorney Bradford C. Peabody, Assistant Public Defender, requests that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

The following facts and quotations are taken from the Joint Record Extract filed in the Court of Appeals of Maryland.

Hearing

At the pretrial suppression hearing, Respondent testified that, on February 1, 1988, he was visiting Hagerstown, Maryland from his home in Florida, when he left his only piece of luggage in the living room of a friend named Marla Gardin, after spending the night there. (E.2-7). She had no permission to open his luggage. (E.4,6). Respondent intended to return and retrieve the bag, later. (E.5).

Marla Gardin testified for the State that Respondent had stayed the night, at her house, on previous occasions. (E.12-17). But on the date in question, February 1, 1988, Respondent and other men had just arrived from Florida. (E.16-17). Respondent "said they just wanted to leave their bags and they would be back to get it, they was going to look for a room or something." (E.17-18). She "gave them permission to leave their bags there." (E.20). No one gave her permission to open the bags. (E.20). Respondent's bag was "closed the entire time." (E.20).

Hagerstown Police Detective Nelson M. Sheppard also testified for the State, at the hearing, that on February 1, 1988, he went to Gardin's apartment and "indicated to her that [he] had received information that there were drugs in her apartment that was brought there by four subjects who just arrived that morning." (E.23). Gardin signed a consent to search form, and "[a]fter she signed the consent form, she pointed to some luggage which was located on the southwest corner of the living room and she stated 'they had just brought it here this morning and if there's any drugs it would be in there.'" (E.24-25). The zippered bag in question was closed and had Respondent's name tag on the "outside." (E.11, 28-29).

The trial court ruled that, under these facts, Respondent had neither standing to contest the search nor a reasonable expectation of privacy in his own luggage. (E.45-50). The trial court called it "a gratuitous bailment," (E.47), adding:

> "[T]he fact that these defendants, who apparently come up here from Florida and flop their suitcases down in Miss Gardin's apartment without any arrangement whatsoever, they have no interest in that apartment, no proprietary interest whatsoever, and they flop their suitcases in there and then just go off, intending to return hours or days later, does not give them any Fourth Amendment right to challenge the search of her apartment." (E.47).

The Court of Special Appeals agreed with the trial court, *Owens v. State*, 83 Md. App. 353, 370, 574 A.2d 362 (1990):

> "We hold that a third-party gratuitous bailee of a container may give valid consent to police to search that container where the bailee is in a position to deny the owner of the item physical access to it, and where the bailee is in an inculpatory position as a result of the bailment. Under these circumstances, the owner of the item has relinquished control

> over the item to a sufficient degree to undermine his or her expectation of privacy in the item. With the expectation of privacy eroded, the owner has no valid Fourth Amendment search and seizure complaint regarding the legality of the search of the item.
>
> Were we to hold otherwise, sophisticated couriers of contraband might soon avail themselves of the following scenario as a means of avoiding prosecution for these offenses: The courier engages a third-party to take control of the contraband. The third-party, if accosted, then consents to a search in order to exculpate himself or herself, but denies ownership of the item. The true owner of the item then has the evidence suppressed, based upon a violation of his or her own expectation of privacy.
>
> We hold that under the total atmosphere of this case, whatever subjective expectation of privacy appellant retained in the bag was objectively unreasonable. Accordingly, we affirm."

The Court of Appeals of Maryland reversed, *Owens v. State*, 322 Md. 616, 589 A.2d 59 (1991), concluding: (1) that Owens had a reasonable expectation of privacy in his luggage; (2) that the warrantless seizure of the bag was lawful; but (3) that the warrantless search of the bag was not lawful.

REASONS FOR DENYING THE WRIT

Before reaching the issue raised by Petitioner, the State of Maryland, under *California v. Acevedo*, ____ U.S. ____, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991), it is apparent that the Petitioner neglected to support its bald allegation that, "As *the Maryland Court of Appeals acknowledged, the police had probable cause* to believe Owen's bag contained contraband." Petition for Writ of Certiorari at 19 (emphasis added). The Maryland Court of Appeals made no such conclusion, whatsoever, for the simple reason that the State never elicited evidence to show probable cause and never argued probable cause, at the suppression hearing. (E.32-45). Instead, at that hearing, the State relied solely on the "consent" of the occupant of the apartment to validate the search of the bag. The prosecutor, who declared that he had "address[ed] all the issues," disavowed any "abandonment" argument, and completely omitted any claim of probable cause. (E.35-38). Moreover, that claim, that the police had "probable cause," was never made by the State in its Brief in the intermediate appellate court, the Court of Special Appeals of Maryland. When the Court of Appeals of Maryland granted

Owens' Petition for Writ of Certiorari, the sole question, as presented to that Court by Owens was:

> "Did the trial court err in holding that Petitioner had neither standing to contest a search of, nor a reasonable expectation of privacy in, a piece of luggage he placed in a friend's living room, temporarily?"

The State filed only an "Answer to Petition for Writ of Certiorari," but no conditional cross-petition, and stated the sole question, in this fashion:

> "Did Marla Gardin have the authority to consent to a search of her apartment, including the search of an unlocked bag that Owens left in Gardin's living room for an indefinite period of time?"

The first time the State ever raised the "probable cause" claim was in its Brief in the state's supreme court, the Court of Appeals of Maryland.

It appears that the State's untimely claim of "probable cause" stems from the testimony of a single police officer, at the suppression hearing, that, to gain admittance to the apartment, he "indicated to" the occupant that he "had received information that there were drugs in her apartment that was brought there by four subjects who just arrived there that morning." *Owens v. State*, 322 Md. at 620. For whatever reason, the State never asked the police witness whether or not he had told the woman the truth.[1]

The remaining question posed by the Petitioner is the only one which was timely raised and decided below: the validity of the resident's consent to search luggage which the police believe belongs to a traveler who just arrived at that apartment.

Petitioner, in this Court, seizes upon the mere citation, by the Maryland Court of Appeals, of *Arkansas v. Sanders*, 442 U.S. 753 (1979), since overruled by *California*

---

[1]The curious decision by the State to totally avoid trying to show probable cause, at the suppression hearing, suggests that the police officer may actually have acted on a mere hunch, e.g.: that four black males, arriving in that area of Hagerstown, Maryland, in a car with Florida license plates, may have brought illegal drugs. Stating that hunch as a fact would have been a ruse to elicit some information from the occupant of the apartment. However, the use of such a ruse would not have made, literally, untrue anything that the police officer said, under oath. The conditional reply of the resident confirmed only that persons had arrived. She "pointed to some luggage which was located on the southwest corner of the living room and she stated 'they had just brought it here this morning and *if there's any drugs* it *would be* in there.'" *Owens v. State*, 322 Md. at 621 (emphasis added).

v. Acevedo, ___ U.S. ___, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991), as a supposedly fatal flaw in the decision of that Court, in the case at bar. However, the question in *Acevedo*, as framed by this Court, was:

> "whether the Fourth Amendment requires the police to obtain a warrant to open the sack *in a movable vehicle* simply because they lack probable cause to search the *entire car*." *Acevedo*, 114 L.Ed.2d at 630 (emphasis added).

In *Acevedo*, unlike the case at bar, it was held that the police *"had probable cause* to believe that the paper bag" which Acevedo was seen carrying to a parked car "contained drugs." *Id.*, 114 L.Ed.2d at 626. Overruling "the *Chadwick-Sanders* rule," [2] this Court stated:

> "We conclude that it is better to adopt one clear-cut rule *to govern automobile searches* and eliminate the warrant requirement for closed containers set forth in *Sanders*." *Acevedo*, 114 L.Ed.2d at 633-34 (emphasis added).

In the case at bar, the State presses for a sweeping extension of *Acevedo*, far beyond "automobile searches," to allow warrantless searches of a traveller's closed luggage or other containers, in general.[3]

The law, as it applies to the facts found by the trial judge, (E.47), was discussed by Professor LaFave, in *Search and Seizure* (1987 ed.), §8.3(f) n.87, wherein he quotes with approval from *United States v. Block*, 590 F.2d 535 (4th Cir. 1978), the decision of the Fourth Circuit Court of Appeals holding ineffective the consent by a mother to a search of a trunk in her adult son's room:

> "Common experience of life, clearly a factor in assessing the existence and reasonableness of privacy expectations, surely teaches all of us that the law's 'enclosed spaces' -- mankind's *valises*, *suitcases*, footlockers, strong boxes, etc. -- are frequently the objects of his *highest privacy expectations*, and that the expectations may well be at their *most intense* when such effects are *deposited temporarily or are kept semi-permanently*

---

[2]Referring to *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979).

[3]See *Connecticut v. Mooney*, No. 90-1887, wherein this Court, on October 15, 1991, denied that State's Petition for Writ of Certiorari. The state supreme court had invalidated the warrantless search of a closed, unlocked duffel bag and cardboard box found near where its homeless owner was known to live under a bridge. *Connecticut v. Mooney*, 558 A.2d 145 (Conn. 1991).

> *in public places or in places under the general control of another.* Indeed, to *the sojourner in our midst -- all of us at one time or another* -- the *suitcase* or trunk may well constitute practically the *sole* repository of such expectations of privacy as are had." *Id.* (emphasis added).

See State v. Pinegar, 583 S.W.2d 217 (Mo. App. 1979), wherein the defendant, an adult son, was held to have a protected expectation of privacy in an unlocked footlocker in the room he occasionally used in his parent's home; *State v. Evans*, 372 P.2d 365 (Ha. 1962), wherein a wife could not consent to a search of her husband's cuff link case, in his dresser drawer; *In re Scott K.*, 595 P.2d 105 (Cal. 1979), wherein a father could not consent to the search of a tool box in his son's bedroom, where the "father claimed no interest in the box or its contents;" *United States v. Impink*, 728 F.2d 1228 (9th Cir. 1984), wherein a landlady, who had reserved the right to store her property in the garage and to enter to retrieve it, could not consent to its search; *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964), wherein a desk clerk could not lawfully consent to a search of an absent guest's room.

Of course, the result would be otherwise, as in *Frazier v. Cupp*, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), if the contents of the item of luggage had been shared by the defendant and the person who consented to a search of the bag. Frazier could not claim a reasonable expectation of privacy for a single "compartment" within the "duffel bag" he shared with his cousin. But in the case at bar, the person who consented to the search of Respondent's luggage admitted that she had no permission to open it, and she expressly disclaimed any interest, whatsoever, in the bag or its contents, when she talked to the detective, before the search. (E.25). The detective was looking for drugs which had, supposedly, "just arrived," (E.23); he was explicitly told, and he obviously believed, that the luggage did not belong to the woman who consented to its search. (E.25). The detective testified that the bag bore the male Respondent's name, on the "name tag," which was on the "outside" of the bag, and that the bag was "closed," when he approached it. (E.28-29). This case is a far cry from the scenario envisioned by the Court of Special Appeals, herein: a "sophisticated

courier" leaves his bag with a "third-party" who, "if accosted," tricks the police into believing that she can "consent" to a search of the bag, whereupon the wily, "sophisticated courier ... has the evidence suppressed, based upon a violation of his ... own expectation of privacy." (E.70). In the case at bar, no one misled the detective, at all, as to the origin or ownership of the bag.

It would be ironic, indeed, if "the sojourner in our midst," *Block*, *supra*, had a protected right of privacy for his luggage inside a hotel room, *Stoner*, or inside a warehouse, *United States v. Piet*, 498 F.2d 178 (7th Cir. 1974), or in the hands of a common carrier, *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966), or in a hospital room, *Commonwealth v. Silo*, 389 A.2d 62 (1978), or in an airport baggage claim area, *United States v. Fernandez*, 772 F.2d 495 (9th Cir. 1985), but not in a friend's living room.

As Professor LaFave opined, *Search and Seizure*, *supra*, §11.3(f) at 341:

> On occasion courts have had to deal with the question of standing to object to the search of some container, such as a suitcase or briefcase, which is being transported from place to place. The owner of such a container cannot be said to have lost *standing* merely because he is not openly exercising direct control over it at the time of the search.... *So long as there "is no intent to sever all connection with the object being transported,"* the owner of the container may continue to have standing after he has checked it with a transportation company *or put it into the hands of another person*. (emphasis added).

In *Corngold, supra*, customs agents had probable cause to believe that some packages which Corngold left with an airline for shipment contained contraband. The government made "no showing that the packages might be removed before a warrant could be obtained." *Id.*, 367 F.2d at 3. Corngold "was not threatening to remove them, nor was the airline, except under such conditions as the officers saw fit to impose." *Id.* Nevertheless, the officers "opened" the shipment, "found" the contraband, "resealed" the packages, let them be shipped, and "maintained constant surveillance of the packages until they were claimed three weeks later." *Id.* at 2. The federal Circuit Court held that, "The officers had no warrant, and there were no circumstances which might have justified a search without one." *Id.* at 3. "From the

time the appellant left the packages with the carrier in Los Angeles they were subject to the effective control of the customs agents. There was nothing to prevent the agents from securing a warrant on a proper showing either before the packages were shipped from Los Angeles or after they arrived in New York." *Id.* at 3.

In another airport case, *Fernandez*, *supra*, a D.E.A. agent in Miami became suspicious of the defendant and the contents of a piece of black luggage he checked with the airline. *Id.*, 772 F.2d at 496. After the flight arrived in Las Vegas, a trained dog was used to detect narcotics inside the bag, while it was still in the baggage handling area. *Id.* The D.E.A. allowed the suspect to claim the bag, before making the arrest. *Id.* The federal Circuit Court held that Fernandez "had a reasonable expectation of privacy in the suitcase and its contents" and reversed the trial "court's determination that Fernandez lacked standing under the fourth amendment to challenge the search of the black suitcase." *Id.* at 500.

In the case at bar, however, the trial court, as well as the Court of Special Appeals, held that any "gratuitous" bailee of a container may give the police valid consent to search it. *Owens*, 83 Md. App. at 70. (E.45-50, 70). It is that broad rule which the Court of Appeals of Maryland rejected, herein.

That issue was squarely raised in a case strikingly similar to the case at bar, *United States v. Wilson*, 536 F.2d 883 (9th Cir. 1976). In that bank robbery case, Wilson and three codefendants left Los Angeles, the day before the robbery, and spent the "evening" together in the apartment of Sharon McKee, a woman who lived in Oakland. *Id.* at 884. Wilson and one of the codefendants spent that "night" in a motel, leaving their suitcases behind, at the woman's apartment. *Id.* The next morning, at 10:20 a.m., the bank was robbed. *Id.* "By early afternoon," investigators learned that Wilson had spent the "evening" at the woman's apartment. *Id.* At about 3:30 p.m., F.B.I. agents, "with the consent of" the woman "but without a warrant," entered the apartment and found the suitcases. *Id.* The woman "*told the agents that the suitcases were not hers and that they had been left by visitors the night before.*" *Id.* (emphasis

added). The F.B.I. opened the bags, finding evidence the defense wanted suppressed. *Id.* The federal Circuit Court held that:

> Although McKee could effectively consent to the agents' search of her apartment, *she had neither actual nor apparent authority to consent to the suitcase searches*. She disclaimed any ownership of or possessory interest in them. She had neither the "common authority" over nor the "mutual use" of the suitcases that could give constitutional validity to her consent. (*United States v. Matlock*, (1974) 415 U.S. 164, 171 and n.7, 94 S.Ct. 988, 39 L.Ed.2d 242; *see Corngold v. United States* (9th Cir. 1966) 367 F.2d 1, 6-8.) (emphasis added).

In addition to *Wilson*, *supra*, Professor LaFave cites three other gratuitous bailment cases which uphold the owner's reasonable expectation of privacy in a piece of luggage which he entrusted to someone else. In *United States v. Prescott*, 480 F.Supp. 554, 556-57, 560 (W.D.Pa. 1979), the Y.M.C.A. could not lawfully consent to the search of a duffel bag left behind by the defendant, even though the Y.M.C.A. agreed to hold the bag, without compensation, for 60 days after the defendant had been incarcerated and had stopped paying rent. *Id.* at 560. The federal District Court observed:

> "Application of the Fourth Amendment does not turn on the nature of the property interest involved but on the *reasonableness of the expectation of privacy*.
>
> * * *
>
> Although the tenant ... of an apartment may consent to the search of the premises, a consent is insufficient to justify a warrantless search when the searched item is the exclusive property of the guest." *Id.*, 480 F.Supp. at 560. (emphasis added).

See Matter of B.K.C., 413 A.2d 894, 900 (D.C. Cir. 1980), wherein the appellant retained a reasonable expectation of privacy in his briefcase, after he allowed his companion to carry it; *State v. Cooke*, 282 S.E.2d 800, 806-08 (N.C.App. 1981), *aff'd* 291 S.E.2d 618 (N.C.1982), wherein a companion could not consent to the search of Cooke's suitcase, over which he was a gratuitous "bailee to whom Cooke entrusted the safe keeping of his suitcase," *id.* at 807, because "Cooke's *name was on the suitcase*," *id.* at 808, and the companion "had no right to open the suitcase and *knew* he could not give anyone else permission to open it." *Id.* at 807. (emphasis added). Cooke retained "his expectations of privacy in the contents of *his own suitcase*...." *Id.*

(emphasis by the court). *Compare Thompson v. State*, 62 Md. App. 190, 200, 488 A.2d 995 (1985), wherein Thompson had "standing" to contest the search of his briefcase, found under the bed of a friend, in the friend's motel room, however, "the officers had ***no reason to believe*** that the briefcase under the bed was ***the special property of the appellant***, as distinguished from any other closet, drawer, box, suitcase, or purse examined in the course of the larger search" of the friend's motel room. (emphasis added). Unlike *Thompson*, in the case at bar, the detective knew the person consenting to the search was not the owner of the bag. (E.23-39).

The reasonableness of a man's expectation of privacy, while visiting the home of a friend, was recently discussed by this Court, in *Minnesota v. Olson*, 495 U.S. _ __, 109 L.Ed.2d 85 (1990), wherein the police "made a warrantless, nonconsensual entry into a house where Olson was an overnight guest and arrested him," after learning that he was the driver of the getaway car in an armed robbery and was "staying" with two women in their apartment. 109 L.Ed.2d at 91. This Court ruled "that Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." *Id.* at 93. Rejecting the State's argument that Olson had no expectation of privacy, because he was never "left alone" in the apartment or "given a key," this Court observed:

> "We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a houseguest has a legitimate expectation of privacy in his host's home." *Id.* at 94.

Moreover, this Court said,

> "[H]osts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." *Id.* at 95.

The result, in the case at bar, is wholly unaffected by this Court's holding in *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980), wherein

the defendant not only entrusted his effects to a female companion, but he actually put them into her purse, thereby, surrendering all right to control access to them. *See Frazier, supra*, to the same effect, involving a duffel bag. Nevertheless, the trial court, herein, was "particularly struck by the language in [*Rawlings*] *v. Kentucky* at [100 S.Ct.] page 2561," and felt that Respondent's "legitimate expectation of privacy" depended upon the "area" searched. (E.48). Obviously, it did not.

Finally, it must be noted that the prosecutor, in the instant case, expressly conceded that there was no "issue of abandonment here," (E.36), which concession was completely overlooked by the intermediate appellate court, the Court of Special Appeals, when it maintained that Respondent "relinquished control over his bag," had "no specific plans to recover the bag within a reasonable time," and "never made any effort to recover or make any inquiry in respect to the bag." *Owens*, 83 Md. App. at 369. Herein, the only "abandonment" occurred, when the prosecutor abandoned that issue. *Fernandez, supra* at 499-500; *Cooke, supra* at 806.

The State's position, essentially, is that Respondent would have a more reasonable expectation of privacy in "'a glass telephone booth,'" *Owens*, 83 Md. App. at 364, than in the living room of a friend. *See Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Bradford C. Peabody

Bradford C. Peabody
Assistant Public Defender
Appellate Division
201 Saint Paul Place
Baltimore, Maryland 21202
(301) 333-4829

Counsel for Respondent

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No. 91-153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF MARYLAND,

Petitioner,

v.

LENARD BERNARD OWENS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

REPLY BRIEF

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
MARY ELLEN BARBERA
SARAH E. PAGE
Assistant Attorneys General

200 Saint Paul Place
Baltimore, Maryland 21202
(301) 576-6422

Counsel for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

12

TABLE OF CONTENTS

Page

REPLY ARGUMENT.....1

The Second Question Presented in the Petition is properly before the Court...1

CONCLUSION.....9

TABLE OF AUTHORITIES

Page

Cases

Arkansas v. Sanders,
442 U.S. 753 (1979).....4, 5, 7

California v. Acevedo,
111 S. Ct. 1982 (1991).....4, 5

Franks v. Delaware,
438 U.S. 154 (1978).....3

Henry v. State, No. 41,
Sept. Term, 1990
(Md. Ct. App. Oct. 11, 1991).....7

Hildwin v. Florida,
490 U.S. 638 (1989) (per curiam).....3

Johnson v. United States,
333 U.S. 10 (1948).....6

Manhattan Life Ins. Co. v. Cohen,
234 U.S. 123 (1914).....8

Orr v. Orr, 440 U.S. 268 (1979).....3

Payton v. New York,
445 U.S. 573 (1980).....3

Riddick v. State, 319 Md. 180,
571 A.2d 1239 (1990).....8

Robeson v. State, 285 Md. 498,
403 A.2d 1221 (1979),
cert. denied, 444 U.S. 1021 (1980).....7

United States v. Chadwick,
433 U.S. 1 (1977).....4, passim

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REPLY BRIEF

REPLY ARGUMENT

THE SECOND QUESTION PRESENTED IN THE PETITION IS PROPERLY BEFORE THE COURT.

Respondent Owens contends in his Brief in Opposition to Petition for Writ of Certiorari that the second question presented in the State of Maryland's

petition is not properly before this Court. Specifically, Owens contends that (1) the issue was not raised or decided in the suppression court or in the intermediate appellate court; and (2) the issue was not decided by the Court of Appeals of Maryland, the state's highest court. Neither claim supports Owens's argument, as the first is of no legal significance and the second is belied by the Court of Appeals' opinion itself.

Whether or not the probable cause issue was pressed in the trial court or in the intermediate appellate court is irrelevant to the question whether the issue is properly before this Court. The only question of consequence is whether the state's highest court has ruled on the federal question. Indeed, this Court has expressly held that where the highest state court assumes or holds that a federal

question is properly before it and then proceeds to consider and dispose of that issue, any concern as to whether or when the question was raised in the state courts evaporates. Hildwin v. Florida, 490 U.S. 638, 639 n.* (1989) (per curiam); Payton v. New York, 445 U.S. 573, 582 n.19 (1980); Franks v. Delaware, 438 U.S. 154, 161-62 (1978). In this case, the issue presented by the second question in the petition not only was raised in, but was decided by, Maryland's highest court.

As Owens concedes at page 4 of his Brief in Opposition, the State specifically raised the issue in its brief before the Court of Appeals. And, notably, neither Owens nor the Court of Appeals challenged the timeliness of the presentation of the probable cause issue. See Orr v. Orr, 440 U.S. 268, 274 (1979). The State argued that because the record reflected that the

officers had probable cause to search Owens's bag, it was reasonable to open the unlocked bag rather than wait to obtain a search warrant. (Brief of Respondent in Court of Appeals of Maryland at 13). The State noted that although United States v. Chadwick[1] and Arkansas v. Sanders[2] appeared to hold that it was necessary to secure a warrant before searching a container, this Court's decision in California v. Acevedo[3] was then pending, and the Court's earlier decisions were being reexamined. (Brief of Respondent in Court of Appeals of Maryland at 14).[4]

---

[1] 433 U.S. 1 (1977).

[2] 442 U.S. 753 (1979).

[3] 111 S. Ct. 1982 (1991).

[4] Owens suggests that the State did not press this argument at the suppression hearing because it did not believe at that time that probable cause existed to search Owens's bag. (Brief in Opposition at 4 Cont'd

In response to the argument raised by the State, the Court of Appeals discussed Chadwick and Sanders at length, noting that those cases required both a reasonable search and a search warrant. (Pet. for Cert. at 21a-26a, 31a-36a). After discussing some of the exceptions to the warrant requirement, the court said:

> Even though the police may have had ample probable cause to believe that the luggage contained contraband, as was also the case in Sanders, "[w]ith the [bag] safely immobilized, it was unreasonable to undertake the additional and greater

---

n.1). The far more likely reason for the State's omission at that juncture is that Acevedo was not then pending and that, under prevailing law, a warrant was required to conduct the search. In fact, the evidence adduced at the suppression hearing established overwhelming probable cause. The police officers had information that four men had left drugs at Gardin's apartment earlier that day. (E. 23). Gardin not only corroborated that information, but added that Owens had brought drugs into her apartment on prior occasions. (E. 13, 16-20, 25, 28).

> intrusion of a search without a warrant." Chadwick, 433 U.S. at 13, 97 S.Ct. at 2485. Of course, it was more convenient for the officers to search the bag then and there, but convenience is not the criterion by which the Fourth Amendment is tested.
>
> > The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral [judicial officer], which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime."
>
> Id. at 9, 97 S.Ct. at 2482, quoting Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948).

(Pet. for Cert. at 31a-32a).

If in the above-quoted portion of its opinion the Court of Appeals was not reaching the probable cause issue raised by the State, then there would have been no need for the court either to rely upon the

Sanders or Chadwick rule or to make reference to the fact that the police had no warrant. The court simply could have ruled that because the consent was invalid, the search and seizure of the bag was likewise invalid. Or, the court could have ruled as a preliminary matter that probable cause was lacking.

That the Court of Appeals considered an issue not previously raised in the suppression court or the intermediate appellate court is not unusual. In Maryland, a trial court ruling may be upheld on appeal for a reason other than that relied upon below, so long as the record supports it. See Henry v. State, No. 41, Sept. Term, 1990, slip op. at 34 (Md. Ct. App. Oct. 11, 1991), citing Robeson v. State, 285 Md. 498, 502, 403 A.2d 1221, 1223 (1979), cert. denied, 444 U.S. 1021 (1980). It is likewise the rule,

as the Court of Appeals itself declared in this case (Pet. for Cert. at 19a), that an appellate court makes an independent constitutional appraisal in search and seizure cases. See Riddick v. State, 319 Md. 180, 183, 571 A.2d 1239, 1240 (1990). Consequently, in deciding the Chadwick issue, the Court of Appeals need not have been, and was not, deterred by the absence of a lower court ruling as to whether the police had probable cause to search Owens's bag. This Court has jurisdiction to decide the issue by application of "the elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided." Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 134 (1914).

CONCLUSION

Owens concedes that the first question presented by the Petition for Writ Certiorari is properly before the Court. (Brief in Opposition at 4). For the foregoing reasons, the second question presented is likewise properly before the Court.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
MARY ELLEN BARBERA
SARAH E. PAGE
Assistant Attorneys General

200 St. Paul Place
Baltimore, Maryland 21202
(301) 576-6422

Counsel for Petitioner

*Counsel of Record
October 30, 1991